

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

ORIGINAL

77-4182

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P/S

United States Court of Appeals
For the Second Circuit

No. 77-4182

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Intervenor-Petitioner,

v.

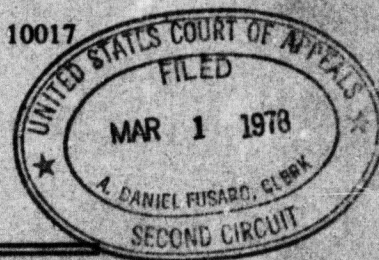
YESHIVA UNIVERSITY,

Respondent.

BRIEF FOR INTERVENOR-PETITIONER
YESHIVA UNIVERSITY FACULTY ASSOCIATION

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v.

YESHIVA UNIVERSITY,

Respondent.

BRIEF OF INTERVENOR-PETITIONER
YESHIVA UNIVERSITY FACULTY ASSOCIATION

Preliminary Statement

This brief is submitted on behalf of the Yeshiva University Faculty Association (hereinafter "YUFA") in support of the petition of the National Labor Relations Board (hereinafter "Board") pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 et seq., as amended by 73 Stat. 519) (hereinafter the "Act"), for enforcement of its order rendered against respondent, Yeshiva University, in Board Case No. 2-CA-14697. YUFA was granted leave to intervene herein by order of this Court, dated on or about November 11, 1977.

Proceedings Before the Board

On October 30, 1974, YUFA duly filed a petition under Section 9(c) of the Act, seeking certification of an appropriate bargaining unit, consisting of the following full-time faculty of Yeshiva University:

"Full-time faculty appointed to the University in the title of Professor, Associate Professor, Assistant Professor, or Instructor, with a full-time teaching load or the equivalent, but excluding part-time faculty; lecturers; visiting faculty with employment at the University for fixed one-year period who are faculty members at another academic institution; emeritus faculty not actively engaged in teaching at the University; faculty of the Sue Golding Graduate School of Medical Sciences, the Albert Einstein College of Medicine, the Yeshiva High School, and certain theological programs affiliated with the University; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-university funds; librarians, research associates and research assistants; dean and acting deans; directors; the Registrar; and other University officers. (A.3)*

Hearings were conducted before a Hearing Officer appointed by direction of the Regional Director for Region 2 of the Board between November 26, 1974 and May 6, 1975. In the course of twenty-one hearing dates, over 4600 pages of testimony and approximately 200 exhibits were amassed as evidence.**

2.

*Record references are to the joint appendix submitted herein and are parenthetically indicated.

**The record in the certification proceedings included testimony from nine days of hearings and numerous exhibits which had been presented in a prior certification proceeding commenced by faculty associations of two graduate schools of Yeshiva University in May, 1974. Those petitions were withdrawn without prejudice on October 22, 1974, and the evidence of those proceedings was accepted into evidence and incorporated in the record in the subsequent proceedings (A. 261).

At the close of the certification proceedings on May 6, 1975, the Regional Director transferred the case to the Board for decision. Both YUFA, the petitioner, and Yeshiva University, the employer, submitted extensive briefs in support of their respective positions.

On December 5, 1975, the Board issued its decision and direction of election (A. 1-15). The unit petitioned for was found proper and appropriate, except that principal investigators, i.e., faculty members administering grants under awards by government or private agencies, were excluded from the unit as supervisors within the meaning of the Act (A.12). Accordingly, the Board found the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

"All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans, but excluding faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and supervisors as defined in the Act." (A. 14).

The Board directed that an election by secret ballot be conducted not later than thirty days from the date of its decision, December 5, 1975 (A. 14-15).^{*} On December 20, 1976, the election was concluded under the direction and supervision of the Regional Director and the ballots tallied (A. 16). One Hundred Forty-One (141) valid ballots were counted and 91 of those, or approximately 66%, designated YUFA as the chosen collective bargaining representative (A. 16). Yeshiva University filed no challenge to the conduct or results of the election, and on December 29, 1976, the Regional Director certified YUFA as the exclusive bargaining representative of the employees in the unit (A. 17-18).

On or about January 5, 1977, YUFA requested to commence collective negotiations with the University with respect to the terms and conditions of employment of members of the certified bargaining unit (A. 19-20). The President of Yeshiva University indicated that the University would refuse to bargain with YUFA, and on or about February 3, 1977, YUFA filed charges under Sections 8(a)(5) and (1) of the Act with the Regional Director, alleging inter alia, the refusal of Yeshiva University to bargain collectively with the certified bargaining representative of the designated bargaining unit (A. 25, 27-28).

4.

^{*}The Court is respectfully requested to take judicial notice of charges filed with the Board against Yeshiva University under Sections 8(a)(1) and 2(6) and (7) of the Act by Louis Bernstein, a faculty member of the University (Board Case No. 2-CA-14064). The effect of the initiation and pendency of those charges was to delay the conduct of the election ordered by the Board, until after Mr. Bernstein withdrew the charges on June 23, 1976. The Court is further requested to take judicial notice that in the course of the election, Louis Bernstein appeared and registered
(continued)

On February 2, 1977, General Counsel for the Board issued a complaint against the University under the charges filed by YUFA. The answer of the University raised no material questions of fact over its refusal to bargain, but in the main reiterated its contentions unsuccessfully litigated in the certification proceeding pertaining to the composition of the bargaining unit (A. 22-24). General Counsel for the Board then filed a Motion for Summary Judgment, and the Board issued a Notice to Show Cause why Summary Judgment should not be granted (A. 22). Again, the University opposed Summary Judgment on the basis of its objections to the bargaining unit determination.

On August 24, 1977, the Board issued its decision and order, granting the General Counsel's Motion for Summary Judgment, finding that Yeshiva University had acted and was acting in violation of Sections 8(a) (5) and (1) of the Act and ordered the respondent:

"1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Yeshiva University Faculty Association as the exclusive bargaining representative of its employees in the [bargaining] unit....

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

5.

*(continued) with the Board representatives supervising the election as a poll watcher for Yeshiva University.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its offices and educational facilities in New York, New York, copies of the attached notice marked "Appendix."...

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith (A. 30-31).

In view of the continued refusal and failure of respondent Yeshiva University to comply with the aforementioned decision and order of the NLRB, the instant proceeding was commenced by petition dated October 17, 1977.

Statement of the Issues

Did the Board properly find that Yeshiva University violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with YUFA, as the certified representative of the designated faculty bargaining unit?

Yeshiva University contends that the Board erred in finding the University guilty of the unfair labor practices, as charged, and specifically contends that the order of the Board is erroneous because the following members of the bargaining unit are supervisory and/or managerial employees excluded from coverage of the Act:

- (a) all full-time faculty;
- (b) members of the University Committee on Academic Priorities and Resource Allocation, and the University Faculty Review Committee;
- (c) Department and Division Chairmen and Senior Faculty;
- (d) Faculty with special administrative responsibilities; and
- (e) Assistant Deans.

Alternatively, the University herein contends that the Board further erred in its definition of an appropriate bargaining unit by excluding certain part-time faculty who taught six or more contact hours in the semester in which the election was held and in each semester of the three previous academic years; and in including those full-time faculty who had received or given notice prior to the election date that their appointments would be terminated at the conclusion of the academic year.

For the reasons hereinafter set forth, YUFA submits to this Court that the Board properly found Yeshiva University in violation of Sections 8(a)(5) and (1) of the Act in that the designated bargaining unit includes no employees excluded from coverage by the Act and is otherwise appropriate and consistent with the rights of the affected employees and the employer under the Act. The unit established, we submit, is appropriately limited to professional employees who are neither supervisors nor managers and who share an appropriate community of interests for the further-

ance of their rights in collective negotiations and representation under the terms of the Act. The decision of the Board in the designation of the bargaining unit certified to YUFA is thus in accordance with a clear and consistent body of law, administrative and judicial, defining appropriate bargaining units of faculty members in higher education.

Introductory Facts

Yeshiva University is a University chartered by the State of New York and accredited by the Middle States Association (A. 2, 1495-96). Insofar as here relevant, the University is composed of three Undergraduate Schools: Yeshiva College, Stern College for Women, and Teacher's Institute for Women (A. 42-43).^{*} The Erna Michael College of Hebraic Studies (hereinafter "Erna Michael College"), James Striar School of General Jewish Studies (hereinafter "James Striar School") and the Yeshiva Program each conduct required instruction programs in Jewish studies for the Yeshiva College student body, and have virtually no independent enrollment other than Yeshiva College students who are mandatorily assigned to one of the three programs according to their relative competence in Jewish studies (A. 483). In total, there are approximately 1200 full-time and 340 part-time undergraduate students (A. 42).

The University is also composed of four non-medical graduate schools: Bernard Revel Graduate School (and its summer division, Harry Fischel School for Higher Jewish Studies) (hereinafter "Bernard Revel Graduate School"), Wurzweiler School of Social Work, Ferkauf

9.

^{*}The parties agreed that for the purposes of the unit sought by petitioner, employment at the Albert Einstein College of Medicine, Eve Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary (hereinafter "Riets"), Cantorial Training Institute, Community Service Division of the Sephardic Community Activities Program and the law school established since the close of the hearings does not constitute faculty service at or for the University, as here relevant and material (A. 64, 869-70, 1479). There are accordingly no issues before this Court pertaining to the faculty at these schools.

Graduate School of Humanities and Social Sciences, and Belfer Graduate School of Sciences (A. 43, 1496). Approximately 336 full-time and 680 part-time students attend the graduate schools (A. 42).

Set forth below is the distribution of the University faculty, excluding the deans and directors of each of the schools. The listing includes all other faculty, including some part-time faculty listed by the University on its exhibits, but not employed at the University in the last semester of the then current academic year:¹

UNDERGRADUATE SCHOOLS

	<u>Full-Time Faculty</u>	<u>Part-Time Faculty*</u>
<u>Yeshiva College</u>	47	42 (5)
<u>Stern College</u>	38	33 (7)
<u>Teacher's Institute for Women</u>	4**	7 (3)

10.

1. These data are based on University exhibits introduced into evidence in the certification proceedings and included in the original record produced for the Court (Univ. Exh's. 100-01, 110-11, 118-19, 123-24, 130, 135, 137, 139-40, 144-45); all have not been included in the joint appendix. Certain other relevant evidence omitted from the appendix is cited herein directly to the transcript of those proceedings with the following indication: (Tr.).

*The parenthetical figure in this column represents those part-time faculty whom the University contends were improperly excluded from the bargaining unit in that they were assigned six or more contact (teaching) hours in each semester in the last three academic years and in the then current semester during the administrative hearings.

**While the University lists 4 full-time faculty here, we
(continued)

	<u>Full-Time Faculty</u>	<u>Part-Time Faculty</u>
<u>Jewish Studies Programs</u>		
<u>James Striar School</u>	6	8 (5)
<u>Erna Michael College</u>	13	8 (0)
<u>Yeshiva Program</u>	10	2
Undergraduate School	—	—
Subtotals:	118	100 (20)

GRADUATE SCHOOLS

	<u>Full-Time Faculty</u>	<u>Part-Time Faculty</u>
<u>Belfer Graduate School</u>	38	3 (0)
<u>Ferkauf Graduate School</u>	32	23 (1)
<u>Werzweiler Graduate School</u>	18	14 (0)
<u>Bernard Revel Graduate School</u>	3	10 (3)
Graduate School Subtotals:	91	50 (4)
TOTALS:	209	150 (24)

11.

** (continued) submit that all faculty at this school, are in fact, part-time for the reasons set forth herein at pps. 89-90, 98, infra.

The following sections of this brief will address the status of the faculty as a whole at Yeshiva University, as relevant to their entitlement to coverage under the Act; as well as the status of those faculty members, whom respondent contends were improperly included in the designated bargaining unit.

Argument

I.

THE RULING OF THE NLRB THAT YESHIVA UNIVERSITY VIOLATED SECTIONS 8(a) 5 AND 1 OF THE ACT BY REFUSING TO BARGAIN WITH YUFA, AS THE DULY CERTIFIED REPRESENTATIVE OF THE EMPLOYEES IN THE BARGAINING UNIT, WAS IN ALL RESPECTS PROPER, AND THE ORDER OF THE BOARD SHOULD BE ENFORCED BY THIS COURT IN ALL RESPECTS.

In opposition to this enforcement proceeding, Yeshiva University contests the identical issues which were litigated in the certification proceedings commenced by YUFA before the Board well over three years ago. The Board rejected each contention of the University, consistent with a line of precedent developed on virtually identical issues and factual patterns at a number of institutions of higher education throughout the country. When YUFA commenced the unfair labor practice proceedings against the University, the order from which enforcement is sought here, the University again raised the same objections to the definition of the bargaining unit. The Board again rejected each contention of the University, directing its officers to commence good faith negotiations with YUFA, as the certified representative of the employees in the designated bargaining unit.

There is no factual issue over the refusal of the

University to bargain with YUFA; nor is there any issue over the status of YUFA as the chosen bargaining representative of members of the bargaining unit. The issues before the Court are those concerning the propriety of the bargaining unit under applicable law and in view of the relevant evidence adduced before the Board.

A. The Applicable Standards of Judicial Review

In Packard Motor Co. v. NLRB, 330 U.S. 469 (1947), the United States Supreme Court enunciated the standard of judicial review of bargaining unit determinations by the Board:

"The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and should be by decision. It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so." Id. at 491.

More recently, in South Prairie Construction Co. v. Local #627, Int'l Union of Operating Engineers, 425 U.S. 800, 805 (1976), the Court reiterated: "[T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed.' Packard Motor Co. v. NLRB, [supra at 491]."

This Court has accordingly granted Board determinations presumptive validity in deference to both the expertise and discretion of the Board in the area of bargaining unit determinations. "[I]n this area at least, Board policy cannot be deemed either arbitrary or in violation of statutory language or purpose. In the absence of conflicting statutory command, the Board has broad powers to determine the exercise of its discretion [citations omitted], and hence judiciary scrutiny of its decisions in this area must be appropriately limited." ILGWU v. NLRB, 339 F.2d 116, 121 (2d Cir. 1964).

The standard of review has been described by this Court as one placing a "heavy burden" on those who would assume, in light of the wide latitude entrusted to the Board, to persuade a court that the Board abused its discretion in certifying a collective bargaining representative. NLRB v. Newton New Haven Co., 506 F.2d 1035, 1036 (2d Cir. 1974).

In New York University v. NLRB, 364 F.Supp. 160 (S.D. N.Y. 1973), New York University claimed that the Board's definition of a faculty bargaining unit, including members whom the University contended were supervisors or independent contractors, was in violation of the Act and due process of law. Although the District Court dismissed the action for lack of jurisdiction, it viewed the judicial scope of review of the faculty unit determination there at issue as follows:

"Whether or not this Court agrees or disagrees with the Board's determination is immaterial;

the Board, at base, is given a large measure of discretion in determining who is and is not an 'employee' or 'supervisor' under the Act." Id. at 165.

See also: NLRB v. George J. Roberts & Sons, Inc., 451 F.2d 941, 948 (2d Cir. 1971) ("A Board unit determination is largely a matter of informed discretion and not to be lightly set aside."); Wheeler-Van Label Co. v. NLRB, 408 F.2d 613, 616 (2d Cir. 1969) ("[T]he Company undertakes a sizeable burden in arguing that the unit found was not an appropriate one; there can be no dispute that the Board has considerable leeway in exercising its judgment under §9(b) of the Act, 29 U.S.C. §159(b), as to the appropriateness of a given unit.... Where it is supported by substantial evidence, [it] will not be reversed in the absence of an arbitrary or capricious exercise of administrative discretion' Empire State Sign Co. v. NLRB, 401 F.2d 559, 562 (2d Cir. 1968)."

The record before this Court is extensive, and the evidence is substantial in support of the conclusions of the Board in the unit determination here at issue. Its findings were neither arbitrary nor capricious, and the designated bargaining unit is consonant both with the Act and sound labor policy for professional employees in academe. There is no basis in fact or law to upset the unit determination here at issue, or to otherwise disturb Board policy, as it has been consistently established and applied in the creation and protection of faculty bargaining units in higher education.

B. Yeshiva University Faculty are neither Managerial nor Supervisory Employees and Fully Entitled to Coverage and Protection under the Act.

In its argument before the Board, Yeshiva University analogized to the industrial model and compared the assembly line and the work product to the educational process and the faculty role therein. Not only does that analogy fail in view of the nature of the academic institution, but it overlooks the status of faculty as professional employees.

There has been no dispute here as to the status of the faculty of Yeshiva University as professionals, as the professional status of university faculty has been repeatedly recognized by the Board [C.W. Post Center, 189 NLRB 904 (1971); Fordham Univ., 193 NLRB 134 (1971) (hereinafter "Fordham I"); Adelphi Univ., 195 NLRB 639 (1972); New York Univ., 205 NLRB 4 (1973) (hereinafter "New York Univ. I"); University of Miami, 213 NLRB 634 (1974); Northeastern Univ., 218 NLRB 40 (1975)]; and the United States Circuit Court [NLRB v. Wentworth Institute, 515 F.2d 550, 557 (1st Cir. 1975)].

Professional employees, as covered under the Act, are defined in Section 2(12) of the Act as follows:

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

"(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

With reference to this definition of professional employees, it becomes relevant to scrutinize the nature of the faculty role in the university context. The Board authorities cited above, as well as the Introductory to the Brief of the American Association of University Professors, submitted herein as Amicus Curiae, all point to a consistency in at least the nature of governance and the definition of the faculty role within the collegial model. That model bears directly on an assessment of the collective role of the faculty within their academic institutions and the purposes and interests served by that role.

In 1970, the Board extended jurisdiction over private, non-profit institutions of higher education in Cornell University, 183 NLRB 329, 331 (1970), and within a year challenges were raised that University faculty were managerial or supervisory and should be excluded from coverage under the Act. C.W. Post Center, supra; Fordham University I, supra. As decided in these initial challenges to faculty coverage under the Act, Yeshiva University faculty, like their colleagues at C.W. Post, Fordham University, and elsewhere indeed share a collective involvement in certain fundamental academic aspects of the university community as an incident to their status as professional employees, but neither the nature nor extent of that involvement renders the faculty managerial or supervisory personnel.

In C.W. Post Center, supra at 909, the Board considered the involvement of faculty in the operation of the University and rejected the contention that they were managerial or supervisory employees:

"The statutes of the university grant the full-time faculty the power and responsibility to formulate and recommend student admission, curriculum, and graduation requirement policy, and rules for students, grading, and honor assignments. The faculty has traditionally exercised this power, subject to the authority specifically 'reserved' to the chancellor and the board of trustees. Faculty status, including appointment, re-appointment, promotion, tenure, and dismissal, are also matters as to which the full-time faculty exercises power and responsibility. Its recommendations on these matters are reviewable by university officials and finalized by the board of trustees. In carrying out these duties and responsibilities, the faculty acts as a group, on the basis of collective discussion and consensus. Consultation between the administration and faculty is the rule with regard to qualifying students for degrees, including qualifications to assume professional status as well as degrees in various diverse specialized fields."

At Yeshiva University, as well, collective faculty involvement exists in certain of the same areas, but, in fact, to a significantly lesser degree than at C.W. Post and at other universities and colleges where the Board has upheld the rights of faculty to collective bargaining representation.

(1) University Governance

The principal and ultimate governing body of the University is the Board of Trustees, which includes no University faculty (A. 1310). The President of the University is also a member of

the Board of Trustees and is the Chief Executive Officer of the University (A. 63). The University administration also includes a Vice-President for Business Affairs, a Vice-President for Student Affairs, and a Vice-President for Academic Affairs, as well as the Registrar, Bursar, Director of Admissions, etc. (Univ. Exh. 22(a) at 129).

The Executive Council sits under the Board of Trustees. Its membership is appointed by the President, and it is statutorily composed exclusively of University officers, including each of the Vice-Presidents, deans, the Assistant to the President and the Director of the University Libraries. Its statutory function is "to deal with University-wide policies and procedures, matters that affect the University as a whole, or two or more divisions, and such other University matters as the President may assign to it." (A. 1948).

There exists also a Council of Graduate Schools and a Council of Undergraduate Schools, each consisting of elected student and faculty representatives from each school and division, each of the deans and directors, and members of the University Administration, including the President, each of the Vice Presidents, the Registrar and Director of Admissions (A. 68, 1491, 1518). These Councils, as advisory to the President and Board of Trustees, are charged on their respective levels with the initiation of programs among the divisions "to develop a feeling of University fellowship; achievement of academic excellence; coordination and cooperation among the divisions." (A. 1491).

There is currently no statutory body on which faculty from both the undergraduate and graduate schools participate to address university-wide issues and matters. There is an ad hoc committee, chaired by University officers, to study the formation of a University senate; in its first year of operation this committee has neither published any documents nor made any proposals for the formation of a University senate (A. 1302). The Graduate and Undergraduate School Councils have been merged to act pro tem as a Committee on Academic Priorities and Resource Allocation in an advisory capacity to the President and Board of Trustees. This committee is chaired by the Vice-President for Business Affairs and has met only twice, still seeking a model to determine its scope and areas of interest (A. 589, 592, 595). There is also a statutory Faculty Review Committee, composed of eight elected tenured faculty members, with jurisdiction to review faculty grievances, particularly those concerning promotion and tenure, and upon consultation with the dean of the interested school, it is authorized to recommend action to the President (A. 1522).*

Each of the schools or divisions is headed by a dean or director. Most of the schools have a faculty assembly and/or student-faculty senate, as well as a committee structure, including, among others, a curriculum committee, standards committee, and welfare committee (A. 80). The faculties of each school meet periodically,

*The functions and authority of the Committee of Academic Priorities and Resource Allocation and the Faculty Review Committee are more fully discussed hereinafter at pps. 69-73. infra.

and at Stern College, Yeshiva College, and the Belfer and Ferkauf Graduate Schools, the faculty meet and conduct their affairs according to written by-laws and/or a constitution, which have been approved (and, in at least one case, amended) by the President (A. 309, 489, 805, 1143). All faculty meetings are chaired by the respective deans or directors and are concerned with a broad range of interests, focused primarily around curriculum, standards and other issues within the faculty's professional domain (A. 310, 541, 666, 730, 810, 1153).

Only two of the schools, Yeshiva College and The Belfer Graduate School of Science (hereinafter "Belfer School"), have Assistant Deans, who are teaching faculty members (A. 472, 852). *

(ii) Hiring Policy and Practice

Full-time faculty appointments are made solely by the President, on recommendation of the dean or director of the respective school (A. 1491). Full-time appointments carry with them a denotation of rank, salary, and general duties (id.). Part-time faculty are generally hired by their respective deans (A. 317, 563, 691, 882, 912, 1142).

The President's hiring of full-time faculty is generally in consultation with the respective deans, wherein the rank of the hiree must be justified by the dean to the President (A. 382).

*Their respective duties and roles are more fully set forth at pps. 74-80, infra.

University witnesses repeatedly reaffirmed the President's active role in the hiring of full-time faculty (A. 1089, 1130), and that even before any search for prospective faculty is undertaken, the President must first authorize the filling of an open position (A. 813; Tr. 3660).

Generally each dean, in consultation with the school's faculty or the interested department and department chairman, will recommend the hiring of a specific applicant to the President, although in each case the dean will first interview and pass on the merits of the candidate after any preliminary screening by faculty (A. 313, 450, 813, 1107).^{*} With respect to original salary rate, rank and term of appointment, the President, in consultation with the interested dean, will unilaterally make such determinations. At the Belfer and Ferkauf Graduate Schools, the interested departments will submit recommendations in these respects to the dean (A. 812, 817, 1181), although the available budget line authorized by the administration is generally determinative of the rank and salary of a new appointee (A. 814, 1035, 1174).

Part-time faculty are hired and appointed by the deans, though department chairmen in some of the schools will interview and submit recommendations to the dean (A. 849; Tr. 1199, 4056). As in the case of the hiring of full-time faculty, the budget line made available by University administration will determine the availability and salary line of part-time positions (A. 966, 1142).

23.

^{*}The role of department chairmen in this process is more fully set forth at pps. 50-56, infra.

(iii) Termination and Discipline of Faculty

The record herein is wholly silent as to any authority, policy, practice or occasion on which faculty action has terminated or effectuated disciplinary action against any faculty member.

(iv) Promotion and Tenure

A number of schools have promotions or promotions criteria committees, made up of faculty and the dean (A. 287, 438, 662, 1167, 1333). Recommendations on promotions from these committees and/or the interested departments are referred to the dean, who exercises independent discretion and judgment in reviewing such recommendations (A. 795, 968, 1167), referring his own recommendation with that of the faculty to the President through the Vice-President for Academic Affairs, who has over-ruled the recommendations of the faculty in the denial of promotions (A. 286, 1163, 1168, 1333). Notwithstanding this process, or should any faculty committee or department decide not to recommend a faculty member's promotion, the faculty member affected may go directly to the President to appeal such a decision and obtain the promotion sought (A. 1167).

Faculty grievances over promotion or tenure may also be taken to the Faculty Review Committee, which is composed of eight full-time tenured faculty members, who serve two-year elected terms (A. 1533). With respect to promotion:

"[B]efore taking any final action, the Committee shall communicate its findings to the Dean of the School involved. If the Committee feels promotion is warranted, after all due consultation

has been exhausted, it shall as a final action communicate with the President of the University recommending such action (id.)."

The same applies with respect to this Committee's deliberations and actions with respect to tenure (id.).

The Vice-President for Academic Affairs summed up the independent authority his office and that of the President exercised in the consideration of promotions:

"All recommendations for promotion finally wind up on my desk...I evaluate them...[and] in the course of going through these recommendations, therefore it is common for me to have to be in touch with the dean to ask for additional information, or to express problems that I am having in seeing how that recommendation is arrived at... I have had conversations with almost every dean who has recommended every promotion in those terms (A. 88-90).

* * *

Q. Based on that consultation [regarding recommendations for promotion], do you draw your own conclusion?

A. Yes...[s]o it becomes clear to me that it is not merely sort of an internal routine rubber-stamp promotion.

* * *

Q. Without your approval, Dr. Fishman, the promotion would not stand?

A. That is correct. (A. 92)."

Notwithstanding these procedures, the President unilaterally froze faculty ranks and notified all faculty that no promotions (or salary increases) would be granted in 1971-72 (A. 1257, 1633). At the Belfer School, the President unilaterally froze all ranks and promotions between 1971 and 1974 (A. 1333).

With respect to tenure, full-time faculty automatically earn tenure upon the eighth year of service as a ranking faculty member (A. 1491), and in most schools there is no formal review process prior to the award of tenure by the President (A. 1034; Tr 2817, 4122). Tenure recommendations, however, in some schools do come from interested departments, committees and/or department chairmen to the dean, who refers those recommendations to the President, who retains final and exclusive authority to grant tenure. Deans have effectively vetoed or blocked faculty recommendations for tenure and have had even their recommendations over-ruled by the President (A. 361, 1005, 1228).

The tenure rules and procedures were recently revised by the Board of Trustees on January 14, 1974 (A. 1501-1505). The revised tenure statement maintains as its premise that: "The President, acting for and on behalf of the Board of Trustees, may grant tenure status at any time by letter signed by him." (A. 1503). On the record of the certification proceedings, policy and practice reflect that this authority of the President is absolute and independent.

(v) Faculty Welfare

Salary scales for most full-time faculty have been determined according to negotiations between faculty welfare committees and University administration. Yeshiva College and Stern College, for example, have negotiated jointly with the University administration since 1968 in the determination of faculty salary scales

(Tr. 4152; YUFA Exh. 107). The welfare committees from both schools consist of elected members of the full-time faculty including department chairmen and senior faculty (A. 363; Tr. 2534; YUFA Exh. 113).

Most recently these welfare committees have jointly negotiated with the Vice-President for Business Affairs, establishing salary rates for all full-time faculty at both schools, including department chairmen and senior faculty (A. 1259, 1634). These rates are also given effect for the full-time faculty at Erna Michael College, one of the Jewish Studies Programs for the students of Yeshiva College (A. 543). The Yeshiva-Stern Welfare Committees have also taken up matters of fringe benefits and pensions, as well as retirement age, although the Vice-President for Business Affairs has indicated that any change in pension and retirement policy is contingent upon approval of the Board of Trustees (A. 1259-1262).

The Yeshiva College Welfare Committee has also been authorized by a unanimous faculty resolution to consider grievances and disputes over promotions (A. 1264; Tr. 4179; YUFA Exh. 111). The Yeshiva College Welfare Committee has also represented individual faculty in grievances over workload and salary levels (A. 1263). The welfare committee regularly reports to the faculty at faculty assembly meetings (A. 1267).

The Werzweiler Graduate School faculty Welfare Committee acts on behalf of the full-time faculty at Werzweiler in collective bargaining (A. 1017). In the last year this welfare

committee negotiated with the University Budget Committee, composed exclusively of University administration and the dean of Werzweiler, and settled a two-year agreement of across-the-board salary increases for the entire full-time faculty (A. 1019; Tr. 3610).

The faculty Welfare Committee at the Ferkauf Graduate School was established in 1967 pursuant to the School's by-laws and subsequently established a salary scale for the full-time faculty there. It has been authorized to represent the faculty over such issues as sabbatical and sick leaves, tenure quotas, retirement benefits, life insurance, etc. (Tr. 4060). The Welfare Committee at Ferkauf also bargained with the University Budget Committee in 1973, submitting proposals on such issues as salary increases, retirement age, faculty representation on the Executive Council, and promotional salary increments (A. 249a, 1236)

The full-time faculty at the Belfer Graduate School established a welfare committee in 1972, which in March, 1973 also submitted salary proposals to the University administration for its full-time faculty (A. 905, 1312). In the course of the spring and fall of 1973, the Ferkauf and Belfer Welfare Committees discussed their joint interests and reorganized as the Yeshiva University Graduate Faculty Association, and in September, 1973 submitted to the President a demand for recognition and collective bargaining demands for the full-time faculty at both the Ferkauf and Belfer Graduate Schools (YUFA Exh. 17). The President responded through the respective deans:

"I have been asked to inform you that University policy mandates that we pursue established channels of communication and procedure - i.e., the Dean continue to confer with faculty committees and individual faculty members of the School on all administrative and academic matters....I am therefore asking again that the members of the Welfare Committee meet with me and the University Budget Committee so that I can complete the necessary discussions on the current budget...." (YUFA Exh's 18, 118).

Since that response, no further negotiations ensued with the Ferkauf and Belfer Welfare Committees, and the Yeshiva University Graduate Faculty Association filed a certification petition with the Second Region of the Board in May, 1974, and withdrew the same on October 22, 1974.

Sabbatical policy is University-wide and set forth in the Faculty Handbook (A. 1506). In 1972, that policy was amended by the Board of Trustees unilaterally to limit the options of a full-year at half pay and a half-year at full pay exclusively to the former (A. 103-04). That action was in response to budgetary problems at the University, and the faculty took no part in the reformulation of that policy (id.; A. 1273).

The retirement age of full-time faculty is also set forth in the Faculty Handbook, as established by the Board of Trustees, and any permission to extend the retirement age on a semester-by-semester basis must come from the President (A. 104). The Yeshiva College faculty, joined by the Stern College faculty, have recently sought to discuss through their welfare committees policy in this area, but the President has refused to accept faculty action on this subject (A. 1287-88).

Faculty benefits, including social security, medical, hospital and life insurance, pension, tuition grants to relatives and allocations for professional travel (requiring the dean's permission) are also set forth in the Faculty Handbook, as formulated and approved by the Board of Trustees (A. 1507-08).

(vi) Curriculum and Student Affairs

Faculty play an active role in the formulation and development of curriculum, as do the deans and even the students at the University (A. 583, 664, 930, 1061, 1150). This role at various schools may be through committees, departments, faculty (and student) assemblies (id.). In each case the faculty usually acts by consensus, with the dean's usual approval following (id.). The faculty may in a similar context work out requirements for majors and undergraduate and graduate degrees, as well as standards for admissions, grading, examinations and graduation, although they must conform, where applicable, to requirements of the New York State Department of Education (A. 283, 290, 427, 557, 673, 727, 934, 940, 957, 1067, 1146, 1154).

In each of these areas, faculty action is nonetheless circumscribed by University policy and direction, with direct participation and direction from University officers, such as the Vice-President for Academic Affairs, the Registrar, and deans and directors of the schools. Thus the Vice-President for Academic Affairs testified:

"All of our academic planning at the university has financial implications and financial needs, and therefore, just as I supervised and coordinate the academic planning throughout the university, Dr. Socol does so with respect to the fiscal wherewithal for such planning. He is the head of what they call the Office of Financial Services, of the university." (A. 115).

The Registrar likewise takes part in questions regarding student standards and grading (A. 1157-58, 1220-21), while students will also often be allowed to contribute to decision-making in these areas as members of various curriculum and standards committees, as well as members of other student-faculty bodies at most of the schools (A. 416, 669, 964). Moreover, the deans play an active role in each of these areas, usually maintaining the final authority at each school to implement any change in curriculum or standards (A. 298, 425, 673, 705, 1150, 1283). Generally, however, such action appears to be by consensus between the faculty and the dean.

Dean Gittler of the Ferkauf Graduate School testified as to the nature of the activities of the curriculum committees and characterized those activities as "a self-evaluation process." (Tr. 3897). As a fundamental incident to their professional role, faculty unquestionably structure their own courses and examinations, review the curriculum of their departments and develop new curriculum. In each of the schools, as separate collegiate bodies, they evaluate their own professional performance, as well as the performance of their students. Most directly involved in the student-faculty interface, they also establish standards for student performance and admissions -- all, however, subject to approval of

higher, administration authorities, who maintain and act on their authority to direct, manage and ultimately approve or disapprove of collegiate faculty action. No single faculty member establishes new curriculum, or admissions, grading and graduation standards, but rather acts as only a single member of a greater body of faculty and administration in the development of curriculum and standards at the University. With even Committees on Committees (Tr. 2372), faculty action in this area originates in an intricate committee structure which generally refers all action to the faculty as a whole, where the collegiate consensus is referred to the dean for his action within the constraints set and enforced by the University administration. The hierarchy is the same at each school and division, with the ultimate authority with the deans and administration to restrict and define policy according to that which emanates down from the Board of Trustees, rather than up from any collegial body of faculty.

(vii) The Overview

Yeshiva University argued to the Board that the faculty's role and authority in each of the foregoing areas warranted their exclusion from coverage under the Act. The Board concluded that Yeshiva University was requesting it to reconsider its previous decisions on the very same issue (A. 4), and ruled:

"We find from our examination of the record, however, that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in the cited cases, wherein the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision-making is on a collective rather than an individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the Board of Trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective bargaining representation." (footnotes omitted) (A. 5).

YUFA does not argue, nor do we believe that the Board concluded, that faculty do not have in some respects a substantial input in certain policy decisions, particularly in the area of student performance standards and the development and formulation of academic and curriculum programs. Moreover, we do not argue that collective faculty opinion and input is not weighed and considered in measuring the merits of colleagues for promotion and tenure. But that input is collective and circumscribed by ultimate authorities over which faculty have no control and which remains unfettered in the ability to accept or reject faculty recommendations. Consonant with their role and status as professional employees, faculty members indeed lend their expertise to the questions affecting University life about which their background and knowledge may be considerable and valuable, but faculty members do not possess the authority or interest, individually or collectively, to govern the essential management decisions which dictate the mission and scope of the employer's operation.

Whatever policymaking authority the faculty does possess is at best advisory, and the power of veto of administration officers and deans over virtually all aspects of faculty action is known at the University as more than a mere potential. Thus the President has denied a faculty resolution on retirement age (A. 1287), and has frozen all promotions and salary increases, notwithstanding faculty recommendations (A. 1257). He has rejected an amended by-law for the Yeshiva College faculty as proposed and passed by the Yeshiva College faculty (A. 1269). Deans more than review department budgets, but will deny "recommendations" from senior faculty or department chairmen (Tr. 2430). The Registrar and other administrative officers have denied faculty recommendations regarding academic standards and transfer credits (A. 690).

At the Belfer Graduate School, the dean has denied approval to the appointment of an elected department chairman (A. 823). Administration officers planned the shift of the Math and Science Education Department to the Ferkauf Graduate School without consultation with the members of that department (YUFA Exh. 106). The dean also denied a request of the Library Committee to meet with administration officers over the contemplated move of the Belfer Library (Tr. 3351; YUFA Exh. 105). The Belfer Faculty Committee formally protested "the failure to consult with the faculty on matters of concern to it," with specific reference to the dean's refusal to convene the Academic Credentials Committee and Faculty Committee to pass on qualifications of new appointees

to the faculty (Tr. 4289; YUFA Exh. 117). The Belfer faculty election of a faculty representative to the University committee to plan the formation of a faculty senate was unilaterally vetoed by the dean (A. 1306).

At the Ferkauf Graduate School, the dean has denied a tenure recommendation approved by the entire body of tenured faculty at the school (A. 1189). The dean has likewise refused to act on faculty recommendations for promotions of individual faculty, where either the promotions were not granted or were deferred for a period of years (A. 1229). Only where the Promotions Committee and dean have agreed have timely promotions followed (A. 1232). The dean at Ferkauf has also vetoed faculty sabbatical requests (A. 1234).

The dean at the Werzweiler Graduate School has denied a faculty committee recommendation for a new appointee and made an offer to a candidate of his own choosing (Tr. 3553, 3584). He has also denied faculty recommendations for the formulation and structure of a Committee on Academic Appointments, seeing the proposal as too "tight on the dean's collar." (A. 1001-02; Tr. 3568-73).

Undoubtedly, Yeshiva University will point to incidents and practices where faculty recommendations, requests and demands have been met by the administration, as well as virtual practices whereby faculty opinion has gained general acceptance. But the picture painted here is not one where there is no communication between faculty and administration, nor where faculty judgment is disowned as either valueless or conflicting with the best interests of the University. Instead, the University maintains

its discretion -- in terms of unilateral and ultimate authority -- to give what weight and import to collective faculty input as it may choose and deem consistent with its prerogatives and goals.

(viii) The Indices of Managerial Status

In NLRB v. Bell Aerospace Company, Div. of Textron Inc., 416 U.S. 267 (1974), the United States Supreme Court held that managerial employees are excluded from coverage under the Act, but deferred to the Board in the definition of those standards which distinguished "managerial" personnel. Id. at 288.* Thus the Court of Appeals for the District of Columbia summarized the two tests applied by the Board in determining managerial status in terms of: (i) whether the employee is so closely related to or aligned with management as to present a potential conflict of interest between the employer and employees; or (ii) whether the employee formulates, determines or effectuates an employer's policies with discretion in the performance of his job, but not if the discretion must conform to the employer's established policies. Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642, 644-45 (D.C. Cir. 1966), cert. den., 386 U.S. 1017 (1967).

The record before this Court fails to qualify Yeshiva University under these standards as managerial employees. Their placement in the hierarchical governance structure of the University

*The applicable principles in the definition of such personnel have been amply set forth in the brief of the Board submitted herein (at pp. 19-24) and have not be reiterated in detail here.

renders their participation in any decision-making processes attenuated and circumscribed by managerial policy and practice which they neither control nor recommend. The discretion which faculty may retain in the recommendation of policy and in effectuating University policy is subject to a body of governing statutes set forth by University trustees in the Faculty Handbook (A. 1491), and the ultimate policy-making bodies, which include the University officers and trustees exclusively, are neither bound nor directed, in fact or intent, by faculty will. We do not mean to suggest or argue that faculty opinion and recommendations are not given weight and consideration by the officers and trustees of the University, but that University management is not bound, and indeed has not been bound, by the recommendations of its faculty in determining and effectuating its policies for the operation of the University.

With respect to the relationship of the faculty to management, a significant history precedes the certification petition herein when faculty welfare committees at virtually every school in the University sought to deal at arms length with management representatives in matters affecting the terms and conditions of faculty employment. While faculty welfare committees and management representatives sought to reach accommodations and agreements on questions such as salary, fringe benefits and personnel policy, the record is again apparent that these subjects were subject to accommodation only at the will of management and, moreover, equally subject to unilateral rescission and rejection by management. See

pp. 26-30, 32-36 supra.

In NLRB v. Wentworth Institute, supra at 557, the First Circuit held that collegiate faculty were not excluded from coverage under the Act merely because of the delegation to the faculty of some authority in and influence over educational policy and governance of the institution, while the trustees and officers of the College maintain the "ultimate authority." See also Adelphi University, supra at 648. At Yeshiva University, like Wentworth Institute, the delegation of such authority to the faculty has been meager, and the ultimate authority of the University trustees and officers has been substantial in the unilateral imposition of policy affecting virtually every facet of University life.

(ix) The Indices of Supervisory Status

The indices of supervisory status are statutorily explicit, as set forth at Section 2(11) of the Act:

"[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Since assuming jurisdiction over faculty in higher education, the Board has consistently refused to deny faculty protection under the Act in the face of employers' contentions that faculty per se possess supervisory attributes. In Finkin, The Supervisory Status of Professional Employees, 45 Fordham L. Rev.

805 (1977), the author discusses the well-developed line of precedent of the Board to such effect and summarizes the rationale of its decisions:

"[The Board] has relied upon three grounds [in finding University faculty to be non-supervisory employees]. First, the authority possessed by the faculty or its committees, divisions and departments is purely recommendatory with final decision-making authority vested in the institution's governing board or delegated by it to the administration. Second, section 2(11) speaks only of 'any individual' who possesses any of the enumerated powers, not of collectives. Third, section 2(11) also requires that the authority be exercised 'in the interest of the employer' which in turn assumes that one is acting for and thus is accountable to higher authority. Faculties, however, are not 'accountable' to management in the sense of being subject to personal sanction or control based on management's assessment of the worth of the faculty recommendation. Thus it is not the kind of supervision contemplated by the Act." (original emphasis); Id. at 817-18.

Although faculty authority at Yeshiva University remains at best recommendatory, the University argued before the Board that in certain subject areas, particularly in academic planning, faculty recommendations were effectively implemented. The Board properly found, however, that the final decision-making authority is vested outside of the realm of the faculty, and that authority has reared its head in direct contravention of faculty recommendations in virtually every area in which the faculty actively "recommends."

Furthermore, in the academic world, where even Committees on Committees exists, the role of the faculty is collectivized in distinct and operative units, ranging from the department to the school to the division. The University nonetheless argues that

all faculty are supervisory, while its argument must be based on faculty action (or recommendations) originating in the main from the collective (or collegiate) voice of faculty departments or committees. That collective voice is exercised accordingly on behalf of the faculty constituency which is represented by the collegiate body in its dealings with administration.

The third criterion cited by Prof. Finkin is the "interest" or end to which the faculty is acting. In this respect it becomes particularly appropriate to recognize the status afforded by congress to faculty as professional employees. The fundamental distinction pertaining to the professionals' employment goes to the degree of independence and discretion retained by the individual in the fulfillment of his or her professional role. The Board has repeatedly recognized that professional employment will often entail work without substantial supervision, including significant authority in "matters of importance to the employer's financial and other managerial interests." Westinghouse Electric Corp., 163 NLRB 723, 726 (1976), enf'd, 424 F.2d 1151 (7th Cir. 1970), cert. den'd 400 U.S. 831 (1970).

While the relationship of the professional to the mission of his or her employer may be unique from that of other employees, the Act neither contemplates nor permits their exclusion from coverage on the basis of that relationship. See Finkin, op. cit. supra at 807-10. For the physician or registered nurse, the mission of his or her employment is excellence in the performance of his or her professional role; the achievement of that professional excel-

lence is also the mission of his or her employer. Likewise in higher education, the mission of management and the professional educator is a shared one toward a common end of achieving excellence in the method and substance of the educational program. While the professional may share a joint interest with the employer, including the pursuit and development of the professional employees' excellence, individually and programatically, that identity of interest constitutes no basis to preclude the coverage of professionals under the Act. Thus the Board ruled in General Dynamics Corp., Convaire Aerospace Division, 213 NLRB 851, 857-58 (1974):

"Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, or else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction. Likewise, technical expertise in administrative functions which may involve the exercise of judgment and discretion does not confer executive-type status upon the performer. A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself, would not make him managerial."

This recognition of the role of the professional and the mission of his or her employer was again considered by congress in its enactment of recent amendments to the Act to provide coverage for employees employed in not-for-profit health care institutions. Congress rejected an opportunity to amend section 2(11) of the Act

to exclude certain professionals from the definition of supervisor, but in doing so it noted with approval:

"[T]he Board has carefully avoided applying the definition of 'supervisor' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and that is not the exercise of supervisory authority in the interest of the employer." S. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (1974).

To the extent that faculty exercise discretion and direction in the exercise of their professional roles as educators, incidental to the fulfillment of their personal professional missions, their exercise of authority is consonant with their professionalism rather than indicative of supervisory status under the Act.

The position of the University that all faculty are excluded from coverage under the Act must fail not only in view of the circumstances which obtain at Yeshiva University and the existing body of law and sound labor policy and practice contrary to its position, but also in view of the legislative history of amendments to the Act reflecting a congressional recognition of the proper jurisdiction asserted by the Board over faculty in higher education. In 1947, amendments to the Act were proposed by the House of Representatives, providing that all charitable and educational organizations be excluded from the jurisdiction of the Board. In the companion senate legislation, the exclusion was limited to not-for-profit hospitals. In the joint conference report of representatives from the house and senate, the senate proposal was adopted because, as the joint conferees acknowledged, the Board

had already concluded on its own part that most charitable and educational organizations were excluded from coverage under the Act on the grounds of their insubstantial affect on interstate commerce. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947).

In Trustees of Columbia University, 97 NLRB 424 (1951), the Board accordingly cited the joint conference report in explaining its refusal to assert jurisdiction over institutions of higher education. Subsequently, that decision and its reasoning were overruled by the Board in Cornell University, supra at 331, where the Board concluded:

"[T]he fact remains that Section 2(2) contains no express exemption for non-profit employer and that subsequent legislation has indicated a congressional preference that the Board should favor asserting jurisdiction in lieu of creating a no-man's land of non-regulation."

In 1974, legislation came before the congress to include not-for-profit health care institutions under Board jurisdiction. By that time the Cornell University precedent and its progeny were ensconced in a line of Board precedent, consistently asserting jurisdiction over institutions of higher education. In the 1974 amendments to the Act, no debate or controversy arose over the jurisdiction assumed by the Board over institutions of higher education and their faculty, while the sole remaining exclusion of not-for-profit employers was removed as health care institutions were legislated under Board jurisdiction. PL 93-360, 88 Stat. 395 93rd Cong., 2d Sess. (1974).

The senate report on the 1974 amendments to the Act

(S. Rep. No. 93-766, 93rd Cong., 2d Sess. (1974)) concluded that there was "no acceptable reason" why hospital employees should remain excluded from coverage. With the Board having already assumed and exercised its jurisdiction over faculty in higher education, this legislative history likewise implies "no acceptable reason," as well as no congressional intent, to curtail the jurisdiction of the Board exercised over university faculty as employees under the Act.

C. The Board Properly Included Department Chairmen within the Faculty Bargaining Unit.

The Board decision in the certification proceeding summarized at some length the nature of the role and responsibilities of department chairmen,* noting the diversity of the same among the chairmen at the various schools (A. 6-10). The Board then concluded that on the record before it the chairmen's authority was "effectively diffused among the department faculty pursuant to the principal of collegiality (A. 9)." The Board noted further that although they possess certain formal responsibilities in decisions on matters of appointment, promotion and tenure, the department chairmen act primarily as instruments of the faculty and as such, "stand largely on the same footing as the faculty, from whom they receive their authority." (*Id.*). Finally, the Board noted that the department chairmen are regular full-time faculty who receive no additional remuneration for assuming the chairmanship positions. The Board concluded that department chairmen should be included in the bargaining unit (A. 10).

As set forth below, the method of selection and the role of department chairmen vary among the schools of the University. Notwithstanding these variations, department chairmen throughout the University serve as representatives of their respective

45.

*Reference herein to department chairmen shall include division chairmen, senior professors and convenors who hold comparable positions at different schools or divisions of the University.

faculty constituencies. While their recommendations and advice to administration may sometimes be afforded more weight than those of other faculty members within the bargaining unit, their influence in such cases results from either their professional distinction and experience or their relationship with their respective deans. They are, as characterized by the Board in other faculty decisions, "first among equals." See Fordham University I, supra; Fordham University II, 214 NLRB 971 (1974); New York University I, supra; New York University II, 221 NLRB 1148 (1975).

A further thread of consistency in the role of department chairmen is their primary and, in fact, ultimate accountability to the faculty whom they represent. This accountability includes, in some cases, the right of faculty to recall designated chairmen. While in some schools, department chairmen's recommendations have been given significant weight and gained regular acceptance, their influence is not a function of the exercise of authority on behalf of the University, but rather, derives from the status afforded them by their respective departments and their standing among their colleagues. In all cases, however, no matter what weight or credibility may be afforded by a dean to recommendations or action of department chairmen, there remains always higher and ultimate authority which reviews, considers, and, on the record here, exercises a power of veto over virtually any action which either originates with a department chairman's recommendation or is otherwise based on input from the department chairman and his or her constituency.

Under either the disjunctive or conjunctive criteria which apply under section 2(11) of the Act, department chairmen at Yeshiva University do not qualify as supervisory employees. Before we analyze the role of department chairmen under each of those criteria, some introduction is necessary with respect to the diverse manner by which department chairmen at the various schools where they exist are designated.

Teacher's Institute for Women, the Yeshiva Program, and the Werweiler Graduate School have no formal departments or department chairmen (A. 722, 916). The faculties at these schools generally meet and act as a whole body (id.).

Yeshiva College is divided into divisions, rather than departments, with division chairmen, elected by the faculty (Tr. 2386). Senior faculty members are those faculty members in each division of Yeshiva College with the longest term of service (A. 449). At Stern College, department chairmen are appointed by the President upon recommendation by the dean (A. 311).

At the James Striar School, a division of Jewish studies, there are five departments, but only two department chairmen, who are chosen by the consensus of the faculty (A. 712). There are no department meetings at the James Striar School, since the faculty meets only as a whole due to its total component of 6 full-time and 7 part-time faculty (A. 712, 1577).

The Erna Michael College faculty has two senior professors in the two major subject areas at the school (A. 1575). The Bernard Revel Graduate School has department chairmen who are elected by

the faculty, although three of the seven listed departments only have one faculty member associated with the department. In each case where there is more than a single faculty member in a department, a full-time faculty member is the chairman (A. 1108; Univ. Exh. 139).

At Belfer Graduate School, chairmen are elected by their respective departments for a three-year term, approved by the school's faculty committee, then by the dean and ultimately appointed by the President (A. 822). The dean at Belfer has not approved all department recommendations for chairman (A. 823), and has acknowledged that the department chairman is the "representative" of the department (A. 824). Similarly at the Ferkauf Graduate School, department chairmen are elected by their respective departments, and upon the dean's approval will be appointed by the President (A. 1177).

Department chairmen are regular full-time faculty,* and none receive any salary increment or bonus for their service in such capacity. They are paid under the regular faculty salary schedules which pertain to all faculty at each of their schools (A. 514, 620, 715, 845). In each of the catalogues of each of the schools of the University, members of the University and individual school administrations are listed separately, excluding any reference to department chairmen. In the listing of faculty

48.

*See pp. 97-98, infra, with regard to certain chairmen who are part-time faculty in schools or departments having no substantial full-time faculty.

in each of the catalogues issued by the University, no denotation or title of chairman or senior professor is given to any faculty member holding that position (Univ. Exh. 22).

Notwithstanding the various means by which department chairmen or senior faculty are designated, the following analysis of their roles under the statutory criteria of supervisory status indicates that neither the positions nor the incumbents possess such authority as to preclude their inclusion in that faculty unit designated by the Board.

- (i) Activity to Hire, Transfer, Suspend, Lay-Off, Recall, Discipline, or Discharge, or Effectively to Recommend.

The authority to appoint and reappoint is vested exclusively in the President, while the deans or directors of the respective schools will forward recommendations for the President's consideration (A. 1499). The input of faculty and department chairmen in the hiring process is at the level of the particular school involved and subject to the approval of the dean and the independent and ultimate exercise of the judgment of the President (A. 812; Tr. 2242).

At Stern College, the department chairman will consult with the dean regarding departmental needs and if the dean consents to the hiring of additional faculty, the dean will then seek authorization from the President or Vice-President for Academic Affairs to fill the position (A. 315). The dean will take responsibility for interviewing candidates for the position, although he may do so with the respective department chairman (A. 313). Before the dean submits any recommendations to the President for a new hiree, he will generally obtain the approval from the department chairman (A. 314).

The department chairmen at Stern College will also make recommendations to the dean regarding the reappointment of faculty for the following year (A. 388). The dean has denied such recommendations and acted, in fact, contrary to the department's recommendations in this regard (A. 388). The dean conceded that the

department chairman does not have authority to reappoint faculty (A. 389). In discussing the termination of a faculty member at Stern, who had appealed her termination to the University Review Committee, the dean at Stern College summarized the role of the President with reference to the hiring and termination of faculty: "As I understand it...the president is the chief executive officer of the University working under the mandate given him by the Board of Trustees. As such he exercises a right on basic decisions, ultimate decisions." (A. 357). When the University Review Committee considered the termination of this Stern College faculty member, it acknowledged that the department chairman "a professional historian, knows best the requirements for a well formed history department," but found itself without authority to overrule the action of the dean in the termination of that faculty member (A. 1562).

At Yeshiva College, senior faculty members play the corresponding rule in the consideration of new faculty hires. Senior faculty members will review applicants and then refer the most outstanding ones to the dean, who will then personally interview those applicants (A. 451). The dean of Yeshiva College indicates that he will generally agree with such recommendations for new faculty, referring them to the President, but only after his independent review of the person's qualifications (A. 452). The dean also acknowledged, however, that not all senior faculty in each of the departments take this role as seriously as others, and in fact some only act perfunctorily in this process, leaving the major

burden to the dean (A. 455).

Senior faculty and department chairmen in each of the schools will take part to various extents in a corresponding process with regard to hiring. While the dean at Stern College indicated that he did not know if department chairmen consulted with other members as to the hiring of new faculty (A. 315), the dean at the James Striar School indicated that other faculty as well as chairmen may play a consultative role regarding hiring, and that the dean only treats the role of chairman as "consultative," independently researching the background and qualifications of any candidate suggested (A. 693). The dean at the Erna Michael College in fact assumed that senior faculty consulted with their respective departments regarding all new faculty hirings (A. 631). At the Belfer Graduate School, an entire department undertakes the search for new faculty, with a vote in departmental meetings among the choices, the result of which is taken by the chairman to the dean (A. 813). At the Belfer Graduate School, the department may also make a recommendation as to the length of appointment, starting salary and the non-renewal of faculty members (A. 817, 838, 892). The dean at Belfer acknowledges that he has not referred all department recommendations in these areas to the President (A. 892), as the constitution of the Belfer Graduate School Faculty allows him the authority to disapprove such recommendations (A. 893; Univ. Exh. 131). In fact, department chairmen have gone over the dean's head to the President over issues of hiring and termination at the mandate of their department (A. 821).

At the Ferkauf Graduate School, the dean first gets authorization for new appointments from the administration and then obtains the assistance of department chairmen in filling those positions (A. 1180). Department chairmen are bound by the judgment of their department as a whole, as they have in fact withdrawn recommendations for new faculty, when the faculty of their departments disapproved such recommendations (A. 1181). Although departments as a whole may recommend to the chairman and thus to the dean the rank of the hiree, the dean reserves his right to make such a determination, particularly in light of budgetary restraints imposed by the University (A. 1174).

With respect to the hiring of part-time faculty, the record does not indicate a significantly different process, except that the dean retains final authority here, and will generally make the appointment of part-time faculty hirees (A. 768; Tr. 3094). With respect to either part-time or full-time faculty, the record is clear that department chairmen serve as representatives of their department and act in a consultative capacity to the dean; any appointments which ensue from their recommendations are subject to the approval of the dean, and in the case of full-time faculty, to the approval of the President.

The record is silent with respect to any lay-offs, terminations or disciplinary measures taken against faculty through any faculty action. In no case on the record herein is there evidence that any lay off, termination or disciplinary action has been taken against any faculty member by action of or even upon recommendation

of any senior faculty member or department chairman. The only testimony with respect to the termination of a faculty member is the case where the dean overrode the department chairman's recommendation and the President upheld the dean (A. 388). While there is brief testimony with respect to the role of only some chairmen in evaluating faculty, one dean acknowledged that the chairman has no information that is not available to the dean or other members of the student-faculty committee concerned with the performance of faculty members (A. 692, 695). Another dean leaves it to his senior faculty to consult with other faculty with respect to the evaluation of any particular faculty members (A. 640). One senior professor refused to observe other faculty teaching (A. 604), and his dean testified that he will rely on other faculty as well as senior faculty in the evaluation of any faculty member's performance (A. 605). Even if chairmen and senior faculty had authority to criticize their colleagues for unsatisfactory work and to inform the University of the quality of their performance, they are not supervisors where, as here, the decisions on the course of action to be taken are made by University officers and the deans. Florsheim Retail Boot Shop, 80 NLRB 1312 (1948).

With respect to the granting of tenure, the Faculty Handbook likewise vests final and exclusive authority in this regard in the President (A.1502). The fact that tenure decisions at the University are made primarily by deans and University administration is apparent in that the record herein is almost silent, except for a few schools, with respect to any

role of senior faculty or department chairmen in the consideration of eligibility for tenure. At Stern College, the dean indicated that he did ask for recommendations from department chairmen regarding tenure, but that they were only "generally" accepted (A. 327). He also testified that the recommendations for tenure which he submitted to the President included the total record of the faculty member's employment, including the dean's personal recommendation (A. 358). The dean summarized that in most instances he went along with recommendations "by the department." (A. 359). In one instance, the dean at Stern College recommended against tenure, but the President nonetheless did grant tenure (A. 361).

At the Belfer Graduate School, departments collectively make tenure recommendations, which the dean then passes on to the President (A. 839). At the Ferkauf Graduate School, a council of all tenured faculty considers the award of tenure to a particular individual (A. 1185). Even though the dean chairs this council, he retains veto power over its recommendations and has exercised that power (A. 1228). At the Werzweiler Graduate School, the dean, acting individually, makes the recommendations to the President (Tr. 3564).

In summary, department chairmen or senior faculty at the University play, at most, a consultative role with their respective deans with respect to the hiring, termination or tenure of faculty. Moreover, the role of department chairmen or senior faculty in this regard is in their capacity as representatives of their departments, and they accordingly act with the advice and consent of the members of their department, serving primarily as an intermediary between

the departments and the dean. The dean maintains independent authority to overrule the recommendations brought to him, still subject further to the action of the President and Trustees. As the record herein shows, practice at Yeshiva University is not significantly different from that at Fordham University, where the Board found:

"In summary, it is apparent that decisions as to appointment, promotion, and tenure are in fact made not by the chairman alone, but by the faculty of the department, acting as a group. To the extent that the chairman's recommendations concerning these matters are given more weight than those of other faculty members, this fact appears to reflect the chairman's superior knowledge and experience, and does not indicate possession of the type of authority contemplated in the statutory definition of supervisor." Fordham University I, supra at 138.

Moreover, department chairmen play their role in these regards in the interest of maintaining the professional integrity and quality of the respective departmental programs. While this interest may be consonant with the interests of the University, it is only a function of the shared mission of the University and faculty, as professional employees, to deliver the highest quality of didactic skills and programs. The chairman's interest bears on his own and his department's professional standing; the University's interest bears on the same, but in conjunction with the managerial and supervisory controls it reserves for operation and administration of its business as a University.

(ii) Activity to promote or effectively to recommend

The power and authority to promote is also vested in the President (Univ. Exh. 51 at 8). The Vice President for Academic Affairs conducts an independent review and analysis of all candidates' qualifications for promotion on behalf of the President (A. 88). The Faculty Handbook also provides that each school shall invite faculty participation in the formulation of promotion requirements, which rules must be circulated among all members of the faculty and deposited with the University Faculty Review Committee. (Univ. Exh. 51 at 8).

At Yeshiva College and Stern College, each of the department chairmen and the dean at each school sit as a committee to review faculty promotions (A. 328, 441). The deans of both schools acknowledged that the department chairmen consult with their departments on the issue of any faculty member's promotion (A. 358, 513). The dean at Stern College indicated that the recommendations from the promotion committee will be "generally approved" (A. 330). The dean at Yeshiva College testified that the recommendations from its promotion committee will also be generally accepted (A. 444), and that both negative and positive recommendations will be referred to the President (A. 443). As the record reflects, however, in the last few years the President notified the faculty at both schools that notwithstanding pending recommendations for promotions, he would grant none and faculty ranks would be frozen (A. 1633).

At the James Striar School, the promotions committee does not include all department chairmen (A. 702). The dean, in fact, testified that he informed the promotions committee that they are only authorized to make recommendations, which will be subject to his action and ultimately the action of the President (A. 702).

At the Erna Michael College, the dean leaves it to the senior faculty to consult with other faculty regarding the evaluation of all faculty (A. 640), and gave no testimony whatsoever that senior faculty submit any recommendations or play any role regarding promotions. At the Bernard Revel Graduate School, the dean testified that all promotions are granted solely upon his recommendation to the President (A. 1113).

At the Belfer Graduate School, departments as a whole consider promotions of individual faculty, making recommendations which the chairman takes to the dean, which are then referred to the President (A. 1333). The President has not granted all such recommendations from the departments (id.). At the Ferkauf Graduate School, departments as a whole also meets to consider the promotion of a faculty member, referring their recommendation on to a committee on promotions, which is elected by the faculty and does not limit its membership to or presently include all department chairmen (A.1164, Tr.3908). The dean also sits on the promotions committee, and he has refused to act on recommendations from this committee, which action is a condition precedent to any promotion being issued from the President (Tr. 4044). At the

Werzweiler Graduate School, promotions are handled between the individual faculty member and the dean, who then submits his recommendation to the President (A. 968).

While the promotion procedures at the level of the individual schools vary significantly, it is clear that in each case, no department chairman acts without consultation with their respective department faculty members, and that any recommendations which emanate from faculty, including department chairmen, are independently reviewed by the dean and then subsequently by the office of the President. Moreover, the record is clear that the President's ultimate authority is more than pro forma, and that he has in fact acted to freeze and deny promotions upon his unilateral choice. No single department chairman or senior faculty member has in fact promoted any faculty member or has effectively recommended promotion. Department chairmen and senior faculty members make recommendations only with the advice and consent of their department, subject then to a full and independent review by the dean and University officers.

(iii) Authority to Adjust Grievances or to Effectively Recommend.

There is virtually no testimony in the record with respect to the role of department chairmen in the handling and adjustment of grievances. The record does indicate that faculty welfare committees will generally handle faculty grievances, on behalf of the individual faculty members, including such matters as workload and promotion (A. 125 3-64). Faculty welfare committees, however, are elected faculty, and consist of chairmen and non-chairmen alike.

Under the Faculty Handbook, the University Faculty Review Committee is authorized to hear faculty grievances regarding promotion, tenure and such other general grievances which faculty may choose to bring to it (A. 1522). In any of those areas, the committee is bound by its own by-laws to first consult with the dean of the school involved, and if the matter cannot be resolved with the dean, the committee is then authorized to make recommendations directly to the President (id.). The record indicates no role or function of department chairmen in dealing with this Committee or in dealing with faculty grievances, except insofar as the chairmen represent their constituencies in the articulation of their grievances.

In sum, there is no evidence or even suggestion that department chairmen or senior faculty play any routine, material or relevant role in the consideration and resolution of faculty grievances.

- (iv) Authority to Responsibly Direct and to Assign or Effectively to Recommend.

The University has produced no evidence to indicate that department chairmen assign, allocate or define particular work assignments or effectively recommend the same, or that they direct the employment of the department. In terms of curriculum, course offerings and the assignment of courses, it appears that curriculum decisions are generally worked out with the faculty body as a whole at each school, while assignments of particular courses will be worked out by members of the respective departments with the consensus of the department and usually the dean's approval.

For instance, at Stern College, the curriculum committee is composed of the department chairmen and the dean and a representative from the office of the Registrar. It meets three-to-four times a year to review curriculum offerings and makes recommendations of any changes to the entire faculty. The committee has also delegated to the dean the right to approve additional new courses within any department (A. 280-81). At Yeshiva College, department chairmen call meetings with regard to course offerings, credits, academic standards, prizes, etc. (A. 511, 1269). On these matters the department acts by consensus, and the chairman retains no right to veto or overrule action of the department (A. 1270-71).

At the Erna Michael College, department meetings also concern activities in the classrooms, the nature and number of examinations being offered, homework assignments, comprehensives and other matters within the academic domain (A. 629). The department there also acts by consensus and generally with agree-

ment between the faculty and senior professors (A. 632). At the James Striar School, there are no department meetings (A. 712).

Similarly at the Belfer and Ferkauf Graduate Schools, the departments meet periodically with all their full-time faculty usually present (Tr. 432). Departmental meetings are informal and all action is taken by consensus or vote (A. 1330). At the Werzweiler Graduate School, there are no formal departments, but rather concentration areas, where "convenors" preside over informal meetings for discussion and "self-education" regarding matters as to the quality of instruction and teaching method (A. 918, 923).

The Board in Fordham University I, supra at 138, included department chairmen, although it found, inter alia, that the department chairmen determined what courses will be offered, when they will meet and whether large classes should be split. No such showing has been made here. The department chairmen at Yeshiva University, like their counterparts at Fordham, exercise no control over the day-to-day work of a faculty member, including the contents of his or her courses, the manner of teaching them and the substance and grading of examinations. There is no material evidence with respect to any evaluation process by which department chairmen here may responsibly direct the professional services rendered by individual faculty members.

In sum, entire school faculties as well as departments at Yeshiva University will collectively consider curriculum development and academic standards, including the methods of grading and nature of examinations. Department chairmen play no singular role whatsoever in this process, but act rather as peers, or as "firsts

among equals," in the consideration of areas of professional interest within the domain of the faculty of the University.

(v) Authority to Award or Effectively
to Recommend

As more fully hereinbefore set forth, compensation paid to the majority of faculty at Yeshiva University is established by negotiations between individual schools' faculty welfare committees and the University administration. No such settlements include any merit increases or any other formula where department chairmen play any role in determining faculty compensation. With the exception of one school, there is no testimony whatsoever as to any particular role played by department chairmen vis-a-vis the award or payment of faculty salaries. While some department chairmen serve on welfare committees, it is solely pursuant to election at large by the full-time faculty of their individual schools (A. 1237; Tr. 2533, 4311).

Solely at the Belfer Graduate School is there any evidence with respect to any role played by department chairmen relative to the fixing of faculty salaries. The dean testified that the department chairmen will make recommendations to him regarding faculty salaries, while the determination of faculty salaries is subject to the approval of the Vice-President for Business Affairs, who has made adjustments as he sees fit (A. 830, 835-36). Recently any recommendations for faculty salary increases have not been accepted because of a budgetary freeze on faculty salaries at the Belfer Graduate School, imposed by University administration (A. 831). Thus, between 1972 and 1974, the University granted no salary adjustments at the Belfer Graduate School, and in 1974 granted an across-the-board increase to all faculty purportedly

"on advice of counsel" because of the pending hearings herein (A. 836). The dean testified, however, that individual faculty have gone over the dean's head to University administration to get adjustments in their salaries (A. 836). In cross examination, the dean testified that he did not recall whether he discussed possible salary increases with the chairman of the Math and Science Education Department in the last year in which increases were given, and indicated that for a period of years in the Chemistry department, when the department chairman's chair was shifting, the dean also did not discuss salary increases with the department chairman in that department (A. 897, 898). With respect to the last promotional increments awarded to members of the faculty at the Belfer Graduate School, they were set unilaterally by the University administration (Tr. 3376).

Department budgets at the Belfer Graduate School for supplies and other operating expenses are set only according to the consensus of the entire faculty of each department, according to the department's needs and as communicated to the dean by the department chairmen (A. 843). The record herein is otherwise silent with respect to any role of the department chairmen in effectively fixing or recommending department budgets, as they pertain to faculty remuneration or benefits.

As is clear in the case of the Belfer Graduate School, the limited role the department chairman may play in discussions with the dean over faculty salaries is much less than effective in the ultimate determination of faculty salaries. Even if there exists a consistent practice and significant role for the department

chairman at the Belfer Graduate School in recommending salary increases to the dean, since the budgetary process requires independent administrative review at levels above that of the dean, the chairman's forwarding of those recommendations to the dean does not render them supervisory personnel. See Northern Virginia Steel Corp. v. NLRB, 300 F. 2d 168 (4th Cir. 1962).

(vi) Chairmen Do Not Meet the Conjunctive Criteria for Supervisory Status.

While the record herein reflects that chairmen possess no individual authority to act in each of the functional areas set out in Section 2(11) of the Act, they are serving in and for the interests of their fellow faculty. Even assuming, arguendo, that chairmen were found to possess some such authority individually, such authority is by no means "in the interest of the employer" and thus precludes their designation as supervisory personnel. The "kinship to management" which is required to render an employee supervisor is best and authoritatively summarized in NLRB v. Security Guards Service, Inc., 384 F.2d 143, 148 (5th Cir. 1967):

"It has seemed to us that if a mere employee at some stage may become a supervisor, the transition becomes an actuality when he is found to possess real power 'in the interest of the employer' to take meaningful action with respect to the statutory tests. It is not alone that he may hire or fire or lay off or discipline. He must do so in the interest of the employer. He must then, when acting, become in effect a part of management, not simply a lead man or straw boss. The entire work force from the president down to the messenger boy in one sense acts in the interest of the employer, as Congress well knew. Surely it contemplated some other test than is afforded by a sheerly literal reading of section 2(11)."

As set forth supra at 47 - 49 , department chairmen at most of the schools are elected by their respective faculty, and at no school in the University do any department chairmen or senior faculty receive any stipend or increased compensation for serving in such position. Only in a few cases do any department chairmen receive any reduced workload to assume the administrative aspects

of the position. Department chairmen serve as the "representative of the department" (A. 824), and have been subject to recall several times by their department faculty membership (A. 894). Department chairmen are conduits between the members of their department and the dean and University administration (A. 250).

Department chairmen are not the senior members in rank or seniority of their respective departments; Yeshiva College even having a separate status for senior faculty. In each of the many listings of the welfare committees submitted herein, a number of department chairmen take part on each committee, as elected by the faculty of their school as a whole, and thus negotiate with the administration as to the terms and conditions of employment of the faculty of their school, as well as assist in and address the processing of individual faculty grievances (A. 1237, Tr. 2534, 4311; Univ. Exh. 113). The Council of Graduate and Council of Undergraduate Schools, composed of administration and elected faculty members from each of the schools of the University, also includes a number of department chairmen and senior faculty (A. 1518; Univ. Exh. 48). Reference to the roster of faculty committees likewise indicates department chairmen and senior faculty interspersed with all other faculty (id.). Not one single committee or body composed of administration officers or deans, such as the Executive Council or the University Budget Committee, includes a single department chairman. Each school at Yeshiva University is supervised primarily and principally by the dean, with direct assistance, participation and involvement of University officers, including the

Registrar and Vice-Presidents for Academic, Business and Student Affairs.

Had the Board "managerialized" department chairmen by excluding them from the unit sought herein, the very operation and governance of the faculty would be disrupted, as the faculty themselves would be divested of and disenfranchised from their designated representative in their dealings and affairs with University management. Reference to the decisions of the Board in New York University I & II, supra; Miami University, supra; and Fordham University I & II, supra; will show that department chairmen at each of those universities, who were included in the bargaining units sought, in fact possessed fuller roles in university affairs than their counterparts at Yeshiva University. By no standards enunciated by the Board in faculty bargaining unit determinations can or should department chairmen at Yeshiva University be deemed supervisory and/or managerial personnel.

D. Members of the University Review Committee are Non-Managerial and Non-Supervisory Employees.

The University Faculty Review Committee is comprised of eight members who are elected by the individual faculties of Yeshiva College, Werzweiler Graduate School, Stern College, Ferkauf Graduate School, Erna Michael College, Bernard Revel Graduate School, Belfer Graduate School and the Albert Einstein College of Medicine. The Committee members are full-time tenured members of the faculty, who serve two-year terms on the Committee (A. 1522).

Under its by-laws, the Committee may handle faculty grievances with respect to promotion, tenure or other miscellaneous matters affecting individual faculty (id.). In each case, the Committee is required first to communicate its findings to the dean of the individual school involved and is then authorized to make "recommendations directly to the president of the University" (A. 1522-24).

The Vice-President for Academic Affairs testified that over the last few years, this Committee has taken formal action on only four cases (A. 79). The only case on the record herein of specific action taken by this Committee was a faculty grievance involving Carol Gruber, who appealed to the Committee regarding her termination. In its report on her particular case, the University Review Committee concluded that it had no authority to bring about her return to her teaching post or to overrule the position of the dean, but that its sole recourse was to refer

the matter to the President "in whom ultimate responsibility rests...He alone makes the crucial decision" (A. 1557).

In sum, there is nothing on the record herein to indicate any direct action or any effective recommendation of this Committee with respect to a particular faculty member's grievance or any relief or disposition actually effectuated or implemented by the Committee.

The Board considered the status of members on the Personnel and Grievance Committees at Adelphi University, which on the record there were active committees with "considerable and effective authority with respect to a wide range of actions affecting the status of the University's professional personnel." Adelphi University, supra at 648. Although the record herein reflects no significant activity by the University Review Committee at Yeshiva University which has had any bearing on action of any dean or the President or Board of Trustees, the Board's rationale in the Adelphi case is applicable here:

"We have held in C.W. Post Center that such authority exercised by the faculty as a group on the basis of collective discussion and consensus was not sufficient to render the individual members of such group supervisors within the meaning of the Act."

* * *

"In this case, as in Post, the ultimate authority does not rest with the peer group but rather with the Board of Trustees. Thus, although the facts indicate that much respect is paid by the trustees as to the recommendations of the collegial body, it is equally clear that the trustees reserve the ultimate authority for themselves. It is also clear

that the Board of Trustees, even if it had such powers, has not attempted to convert the Committees into managerial or supervisory entities. They are not advised to advocate management's interests in making their decisions, nor are they advised that they are management's representatives in making them. Rather, the Board of Trustees (the top of the pyramid) has seen fit to seek, in a formalized manner, the advice of the faculty (the base of the pyramid), and the faculty, by agreement with the trustees, has seen fit to channel its collective advice through these elected Committees." (footnote omitted) (id.).

There is no basis on either the facts herein, or in any applicable law as relevant hereto, to justify or warrant the exclusion of the elected faculty representatives to the University Review Committee .

E. Faculty Members of the Academic Priorities and Resource Allocation Committee are neither Managerial nor Supervisory Personnel.

This Committee was formed in the 1974-75 academic year and had two meetings as of the date of the hearings (A. 589). Chaired by the Vice-President for Financial Affairs, it consists of the members of the Undergraduate and Graduate Councils, sitting together as this Committee (id.) The Committee thus includes the deans and directors of every school, and virtually every single University officer and administrator, with the exception of the President, as well as two elected faculty members from each school of the University and two elected students (A. 1518; Univ. Exh. 48).

The contention by the University that the membership on this Committee renders its faculty managerial and/or supervisory has no basis whatsoever in fact, since the University's own witness testified that to date the faculty do not know what this Committee is about and are searching for models for its operation and purposes (A. 596). No records of any meetings of this Committee or of any recommendations or substantive proposals were introduced into evidence (A. 598). In fact, as the composition of this Committee is limited to the Undergraduate and Graduate School Councils, those Councils themselves have no authority other than to act in an advisory capacity through the hierarchy to the Executive Council of the University, composed exclusively of University administration, and through the Executive Council to the President and Board of Trustees. (See pp. 20-21, supra.)

Besides the vaguely stated purpose of this Committee (to investigate the resources of the University and their allocation in accordance with certain academic priorities), there is nothing on the record to indicate what course the Committee can and will take or what effect any of its action ultimately may have. The Committee is little more than an abstraction on the record here, and with its composition of University administration, faculty and students, it appears to be at most, a broad-based ad hoc Committee to discuss and investigate the standing and goals of the University, with no basis in authority to act on or effectively to recommend or determine any course of action in such regard.

The Court is respectfully referred to the cited excerpts from Adelphi University, supra, quoted herein at pp. 70-71. On the basis of the principles therein set forth, the faculty, elected and collectively sitting on this Committee, in no way qualify as managerial and/or supervisory employees.

F. The Assistant Deans are Neither Managerial nor Supervisory Personnel

There are only two assistant deans at the University, one at Yeshiva College and one at the Belfer Graduate School. Since their positions differ to a great extent, they will be treated separately herein.

(i) Assistant Dean - Yeshiva College

The assistant dean at Yeshiva College is a regular member of the faculty, whose salary is determined according to the faculty salary schedule negotiated by the Welfare Committee (A. 517). The University does not list him as either University administration or a member of the administration of the Undergraduate School, but includes him within the listing of faculty at Yeshiva College (Univ. Exh. 22-A at 129). The assistant dean has teaching responsibilities, and receives an equivalency or remission for his administrative obligations (A. 473, 517).

The assistant dean at Yeshiva College is primarily designated to maintain administrative aspects of the pre-medical program at the College (A. 474). Thus he maintains pre-medical school program records and collates and forwards recommendations for students to medical school (id.). The dean testified that the assistant dean is in an "administrative position" and outside of the specific area of pre-medical school students, his sole administrative functions are those of collecting and collating faculty publications and collecting class assignments and class schedules from senior faculty members: "He simply collates [these materials]

and then we put it into the schedules of courses." (A. 473).

With respect to his particular function in the important area of pre-medical school studies at Yeshiva College, the following discourse took place between University counsel and the dean for Yeshiva College on direct examination:

Q. Would it be correct to state [the assistant dean] establishes policy in this area [of pre-medical school programs]?

A. No, No., I don't think it would be correct to say that.

Q. What does he do in this area?

A. He is simply guiding the students to do and follow the decisions that are being made by the faculty in this [area]." (A. 476).

There is no indication or evidence whatsoever that the assistant dean at Yeshiva College acts in the stead of the dean, makes any policy whatsoever, or has any independent authority appertinent to his administrative assignments. Under none of the disjunctive (or conjunctive) criteria of Section 2(11) of the Act does this member of the faculty possess any of the attributes of a supervisory employee.

(ii) Assistant Dean - Belfer Graduate School

The assistant dean at the Belfer Graduate School is a teaching and tenured member of the faculty, a member of the mathematics department, and enjoys all of the benefits and perquisites of full-time faculty (A. 852-54). He has a remission in his course load for his administrative duties. In the Belfer Graduate School catalogue, the assistant dean is listed as a member of the faculty

and also among the administration (A. 1480).

The assistant dean at the Belfer Graduate School has been elected by the faculty to serve on the faculty Welfare Committee (A. 1312). He is also an elected faculty representative of the school on the Council of Graduate Schools and on the Academic Planning and Resource Allocation Committee (A. 1326). He was also elected by the faculty to serve as an alternate on the committee to form a University-wide senate which elective position the dean refused to him (A. 1337, 1345). While the dean testified on direct examination that he did not want him on that committee because he felt he was an administrator, the dean had explained to an inquiring faculty member on the Welfare Committee that he vetoed the election of the assistant dean to the senate committee because of the assistant dean's lack of academic standing as a faculty member; the dean felt that he would not be an appropriately distinguished faculty representative of the graduate school (A. 1345). This is far different from a conclusion that the assistant dean's administrative responsibilities rendered him an inappropriate faculty representative. Moreover, the dean did not divest the assistant dean of the other positions in which he served as a faculty representative. It should also be noted here that his election to this committee was conducted in the course of the certification proceedings, while his election to the other bodies preceded those proceedings.

The assistant dean at the Belfer Graduate School plays a role in the administration of grant accounting and serves as a

liaison between the registrar and admissions officers and the faculty, as well as taking part in collecting the data over the scheduling and placement of classes (A. 854). When a principal investigator has a grant with a budget, the assistant dean will review the budget with a faculty member to assist that faculty member in ensuring that his budget is within the guidelines of the granting agency and includes the required University expenses of overhead and the like included in each grant proposal (A. 860). As the dean testified, his role is to make sure that the grants are submitted in proper order (id.).

In effect, the assistant dean here renders administrative service primarily on behalf of faculty members with a grant proposal in helping him through the web of governmental regulations and procedures which must be met for each grant proposal. He likewise takes part in the grant accounting in the course of the administration of the grant to keep the principal investigator as well as the University up to date on the expenditures and solvency of the grant (A. 859).

The assistant dean also keeps records as to course assignments and course scheduling and will give room assignments to the faculty (A. 863). Notwithstanding these classroom assignments, the record indicates that faculty may teach courses in their own offices and submit special requests which will be generally granted as to faculty choices of particular and available classrooms (A. 1323). Moreover, it is the faculty who choose the scheduling of courses among themselves and send the schedule to the assistant

dean. He is responsible for working out the administration of that schedule so as to avoid conflicts in the teaching hours or assignments (A. 1320). He will likewise act as a conduit between such University officers as the Registrar and admissions director and the faculty in handling paperwork among faculty, departments and these University officers (A. 1319).

In these capacities, the assistant dean at the Belfer Graduate School exercises no authority in any functional areas encompassed within Section 2(11) of the Act. His duties and responsibilities are primarily administrative, and while the dean testified that there may be conflict between the assistant dean and the principal investigators over the accounting on the grants, the evidence clearly shows that principal investigators have done what they desire notwithstanding the position that the assistant dean has advised (A. 1457). In effect, the role of the assistant dean with respect to the grant administration seems to be that of apprising the faculty member of the budgetary requirements of the grant application and of the budgetary processing of the grant in the course of its execution. He holds and administers no funds, exercises no veto power over any grant proposals, and is not a required signatory on any grant.

The dean did testify that when he was not at the school, the assistant dean would be in charge (A. 863). The University submitted no testimony or evidence, however, to the effect that the assistant dean has ever exercised any independent authority or made any policy in such event, or in fact enjoyed such authority in any such instance. With respect to the faculty assembly meetings,

faculty council meetings and various faculty committee meetings at which the dean generally presides, the assistant dean has never called nor presided at any such meetings of the faculty (A. 1324).

The assistant dean at Yeshiva College is basically identical to the assistant to the academic dean at Point Park College, where the Board found that the position was one which primarily involved academic counselling of students' was occupied by a teaching faculty member; and, furthermore, that the additional administrative work required in the position did not otherwise warrant exclusion as a supervisory title. Point Park College, 209 NLRB 1064 (1974).

The functions of the assistant dean at the Belfer Graduate School fall within the rationale of the decision of the Board in Catholic University, 201 NLRB 929 (1973), where the associate dean was also found to be a teaching member of the faculty, enjoying full faculty status and participation in faculty governance. Although he was the ranking school official in the absence of the dean, he was not delegated authority to exercise independent discretion in the operation of the school in the dean's absence. In view of the limited authority delegated to the associate dean at Catholic University, and in view of his close association with the faculty, the Board found that he was not a supervisor and should be included in the unit (id.).

Both of the assistant deans at Yeshiva University are clearly distinguishable from the associate dean excluded from the unit in Syracuse University, 204 NLRB 641 (1973), where the Board

consulted and advised the dean on personal and confidential matters regarding faculty members, substituted for and represented the dean in the normal course of his duties in policy and administrative matters of a confidential nature, and established curriculum for the summer program. Neither of the assistant deans at Yeshiva University formulate curriculum or have any ultimate responsibility for scheduling or class placements; nor do they act in a consultative capacity with their deans in any confidential matters. Moreover, the record is silent with respect to any role the assistant deans play in the absence of the dean akin to management responsibilities involving any direct supervisory or managerial exercise of authority over the faculty.

In sum, the assistant deans at Yeshiva University act and function as teaching faculty and share a community of interests with the faculty. Their inclusion in the bargaining unit represents no internal conflict and is consonant with the primacy of their faculty status.

G. Utilization of Non-Unit Personnel by Certain Faculty
Do Not Render Such Faculty Managerial and/or Supervisory

Certain faculty committees or committee chairpersons have the use of part-time and full-time secretaries, particularly in the areas of admissions and scholastic standards (A. 531, 1027, 1031), although most faculty generally share access to and use of secretarial help (A. 1026, 1234). On the record herein there are only two faculty members, who are neither department chairmen nor principal investigators, who work directly with a single secretary: one is the chairman of the Doctoral Committee at Werzweiler; and the other, the chairman of the Admissions Committee, also at Werzweiler. Both are faculty committees. One of these faculty members has a full-time teaching load; the other, a three-quarter teaching load. The secretaries render services in connection with these faculty members' committee activities (A. 945, 1031).

One of the secretaries is employed less than half-time, and the other is full-time; both performing routine clerical duties (id.). The fact that faculty with whom they work perform the greater part of their duties in their teaching capacity, removed from and exclusive of their functions with their secretary, precludes more than an incidental or sporadic exercise of supervisory authority.

It is well settled that faculty are not rendered supervisors within a faculty unit, if their supervision of support personnel, excluded from the unit, does not constitute a substantial aspect of their employment. In Adelphi University, supra at 643-45,

the Board explained this principle:

"The issue of supervisory status usually arises where authority is regularly exercised on the employer's behalf, over employees sought by the union, such as foremen in a production and maintenance unit. To include in such a unit persons who exercise statutory supervisory authority would clearly create the conflict of interest which Congress intended to avoid. This does not mean, however, that a similar conflict of interest is necessarily created whenever persons occasionally exercise some authority over other employees of the employer. We have held, for example, that employees in an employer's personnel department who interview and actually hire, on behalf of the employer, applicants for nonskilled or semiskilled jobs are not supervisors within the meaning of the Act. On the other hand, where professionals regularly (more than 50 percent of their time) supervised nonunit employees, they were nevertheless excluded from a unit of professional employees, since under such circumstances the principal interests of the excluded professionals were so allied with management as to establish a differentiation between them and other employees in the unit.

"The underlying rationale of this body of precedent is that an employee whose principal duties are of the same character as that of other bargaining unit employees should not be isolated from them solely because of a sporadic exercise of supervisory authority over nonunit personnel. No danger of conflict of interest within the unit is presented, nor does the infrequent exercise of supervisory authority so ally such an employee with management as to create a more generalized conflict of interest of the type envisioned by Congress in adopting Section 2(11) of the Act." (Emphasis added.)

These principles were reaffirmed and reiterated by the Board in New York University I, supra, and Fordham University II, supra.

Contentions made by University counsel that the time spent by the two committee chairmen at Wurzweiler in the supervision of their secretarial help was not capable of determination

was contradicted by his own witness, who testified that the faculty member, himself, might well make such a determination (A. 1029). Moreover, the determination that the time involved is less than a substantial portion of the faculty members' time is irrebutably apparent on the record to the extent of the teaching load each of them maintains (A. 948). Their use of their secretarial help is unrelated to their teaching duties and constitutes only a minor portion of the balance of their time on committee work. The record herein in no way reflects more.

There is scant reference to some department chairmen working with secretaries, although in the only school about which such testimony was elicited, the dean testified that departments, not chairmen, have secretaries, and that he did not know whether they principally worked for the department or the chairmen (A. 1196). Faculty secretaries are available alike to all faculty, including department chairmen, and it is up to the dean to resolve any disputes over the allocation of secretarial time among the faculty (id.). There is no substantial or material showing on the record herein to warrant a finding that department chairmen, working with a secretary shared by all the members of the department, acts in any real supervisory capacity with such personnel to more than a de minimus extent.

These faculty, like virtually all others, indeed have access to secretarial, clerical, janitorial and other supporting services. To even suggest that the faculty's relationship to

these non-professional personnel renders them supervisory would be to distort a minute and attenuated aspect of faculty employment to an absurd and unrealistic dimension with respect to the real substance and nature of their professional employment as teaching faculty. The incidental use of secretarial and clerical assistance cannot be reasonably construed to segregate these faculty from their colleagues with whom their fundamental terms and conditions of employment are both concomitant and compatible.

H. Part-Time Faculty Were Properly Excluded from the Bargaining Unit.

The University originally took no position as to the status of part-time faculty in the certification proceedings. On the final day of the hearings and in conclusion, the University articulated a position whereby it sought the inclusion of those part-time faculty who teach six or more hours per semester and who have done so in each of the six semesters preceding that semester in which an election would be conducted by the Board (A. 1466).

The Board ruled summarily in excluding part-time faculty from the bargaining unit, citing its precedent on the subject as directly controlling to the circumstances at Yeshiva (A. 5). In its seminal ruling excluding part-time faculty from a faculty bargaining unit in New York University I, supra at 5-6, the Board had ruled:

"[A]fter careful reflection, we have reached the conclusion that part-time faculty do not share a community of interest with full-time faculty and, therefore, should not be included in the same bargaining unit."

* * * *

"The record in this case convinces us that there is no real mutuality of interest between the part-time and full-time faculty at New York University because of the difference with respect to (1) compensation, (2) participation in university government, (3) eligibility for tenure, and (4) working conditions."

That finding has been reaffirmed and restated in Fairleigh Dickenson University, 205 NLRB 673 (1973); University of San Francisco, 207 NLRB 12 (1973); Point Park College, supra; University of Miami, supra; and by the United States Court of Appeals in NLRB v. Wentworth University, supra.

The University seeks to include in the unit herein those part-time faculty who have served for what appears as an arbitrarily determined, continuous period of employment with an arbitrarily fixed workload. As more fully hereinafter set forth, such qualifications on part-time employment status in no way alter the substantial and material disparity in interests and terms and conditions of employment which warrants the exclusion of all part-time faculty from the unit here established.

(i) Terms of Employment

The basis on which full-time faculty are compensated is that a workload of twelve teaching or contact hours, or the equivalent for research activities or extraordinary committee involvement or participation. The full-time requirement of twelve contact hours has been established by the University administration, and equivalencies are defined and permitted under the authority of specific deans (A. 87-88, 804).

Part-time faculty are hired specifically to teach certain courses and are paid on a per course basis, and with almost no exception are not afforded any equivalent time status in lieu of teaching (or counselling) hours (A. 370-1, 498-9, 625, 683, 747, 850, 915, 1203).

While most full-time faculty at the University are covered by salary scales negotiated between the faculty welfare committees and the University administration, no part-time faculty salary rates have been collectively negotiated (A. 339-40, 526, 1239). Thus while the full-time faculty at Yeshiva College and Stern College, covered by negotiated salary scales since 1968, have usually received annual salary increments, part-time faculty at these colleges have received one increment in the same period, granted unilaterally by the University administration in 1970. Since that time, no adjustments have been made in their salary rates (A. 365-67). At the Ferkauf Graduate School, part-time salary scales remain unaltered since 1966, while the faculty welfare committee there has periodically negotiated salary increments exclusively for the full-time faculty (A. 1203-5). Similarly, the faculty welfare committee at the Werzweiler Graduate School has negotiated per annum salary increments for full-time faculty annually, while part-time faculty salary rates have not been increased (Tr. 3610).

At Yeshiva and Stern Colleges, as well as at Erna Michael College, where the Yeshiva-Stern salary rates are also implemented, full-time salary rates range from a minimum of \$8,800 to a maximum of \$23,500 (A. 618, 1634). Part-time faculty are paid in the range of \$500 to \$1,000 per semester for a three-hour course at Yeshiva College and Stern College (A. 502, 372); and at Erna Michael College, \$700 to \$1,000 for four hours of instruction per semester (A. 574). The median salary rate pursuant to the salary schedule for full-time faculty at these schools is in excess

of \$15,000 per annum, while the median salary rates for part-time faculty, worked out on the basis of a full-time load of twelve contact hours, is in the median range of \$6,000, or 40% that of the full-time faculty.

The dean of Belfer Graduate School testified that full-time faculty salary rates there range between \$15,000 and \$40,000 per annum, while part-time salary rates range between \$1,000 to \$2,500 per 3-credit course per semester, or \$8,000 to \$20,000 per annum on the basis of a twelve contact hour workload (A. 850; Tr. 3253-54). At the Ferkauf Graduate School, the lowest full-time faculty salary is approximately \$11,000, while part-time faculty would be paid for a full workload between \$6,400 to \$12,000 per annum (A. 1252, 1205). At the Werzweiler Graduate School, the minimum full-time faculty salary is \$16,000, while the maximum part-time faculty salary would be \$8,000 for a full-time workload (A. 1023, 1009).

At the James Striar School, one of the Jewish studies programs offered to students at Yeshiva College, part-time faculty are paid \$1,500 per 4-credit course per annum, working out to the equivalent of \$4,500 for a full-time load (A. 683). Full-time faculty salary rates at this school, however, are almost twice that rate (Tr. 2948). At the Yeshiva Program, another Jewish studies program, the University contends that there are no part-time faculty and that the average full-time salary for faculty there is in the area of \$14,000 (A. 1086). At the Bernard Revel Graduate School of Jewish Studies, the acting dean testified that he had no knowledge as to the full-time salary rates, and although

the University agreed upon petitioner's request to provide such data, it failed to do so in the course of the hearings (A. 1133; Tr. 3843).

At the Teacher's Institute for Women, the University contends that there are four full-time faculty members in addition to six part-time faculty members (Univ. Exh. 123). It is the position of the petitioner, however, that there are no full-time faculty at this school; the four purported "full-time" faculty members are merely part-time faculty with a 12-hour teaching load at the present time, possessing none of the benefits, privileges and perquisites of full-time faculty. Thus the director of this school testified that part-time faculty are paid at the rate of \$17.75 per hour (A. 750), and then modified his testimony later to indicate that those faculty listed as "full-time" were, as well, paid on the exact same basis (id.).

Most of the fringe benefits afforded to faculty are set forth in the University Handbook. Pursuant to the Handbook, sabbatical leave is limited exclusively as an earned privilege to full-time faculty (A. 1506). Also pursuant to the Handbook, full-time faculty are exclusively eligible to participate in the University retirement income plan, and beginning with the second year of full-time employment, to tuition remissions for members of their family enrolled in any division of Yeshiva University (A. 1508). Likewise, discretionary allocations for professional travel and conference leave are limited to full-time faculty (id.). Only full-time faculty take part in the health and disability insurance which the University provides (A. 373, 502, 622, 848, 911, 1122, 1184).

The Director of Teacher's Institute for Women also corrected his testimony under cross examination to admit that he did not know whether those persons he had designated as "full-time" at this school were in fact eligible to take part in the retirement income plan of the University (Tr. 3064). At this point University counsel offered to provide data with respect to the entitlement of these faculty members to such benefits (Tr. 3065), but failed to do so in the entire course of the proceedings. University counsel did indicate in a colloquy with counsel for the petitioner that those persons listed as full-time faculty at Teacher's Institute for Women indeed "may lack full-time faculty appointments in its formal sense" (A. 726).*

In sum, as University witnesses conceded, the financial commitment of the University in hiring full-time rather than part-time faculty is significantly greater (A. 709). The comparison of full-time and part-time salary rates at any of the schools

90.

*Petitioner also contests the credibility of the Director of the Teacher's Institute for Women, who was the sole witness testifying as to faculty status at the school. In response to a question as to the nature of his job, he referred to his notes and responded: "I consider myself as the executive arm of the faculty." (A. 758). That phrase happened to be identical to the self-description of the dean of James Striar School (A. 688) and the dean of Erna Michael College (A. 575), who had testified on the immediate hearing dates prior. The Hearing Officer granted a voir dire with respect to the notes held by the witness, who initially did not want to turn them over (A. 759). In the voir dire, he testified that his self-descriptive phrase merely came from his "flare for English" (A. 762) and subsequently ripped up the notes. The notes contained only the following markings: "faculty makes decisions and I carry them out" -- "job security, subject job security, tenure." (A. 761).

demonstrates that part-time salary rates are dramatically below those of full-time faculty, whose salaries have been adjusted on a virtually annual basis through a faculty bargaining process which has historically excluded part-time faculty. Moreover, the full range of fringe benefits which the University offers is limited to full-time faculty.

The dean of Erna Michael College explained the differential between the compensation paid to full and part-time faculty on the grounds that part-time faculty are generally not so dependent upon the University for their income, since they are usually employed elsewhere as well (A. 627). The faculty Handbook precludes outside employment of full-time faculty, however, without the express prior written approval of the President (A. 1520). As set forth on the faculty lists submitted for each school, most of the part-time faculty have outside employment, consisting in most cases of academic appointments elsewhere. The dean of Yeshiva College accordingly testified with respect to the low participation of part-time faculty at faculty meetings that it is "difficult to expect these people to take off from their jobs to come to the faculty assemblies." (A. 491). The only schools where a number of full-time faculty have outside employment are in the Jewish studies divisions, such as the James Striar School, where faculty are often rabbis with pulpits (A. 676).

It is the involvement of part-time faculty in outside employment, such that their income will be derived in the main from other employers, that so distinguishes their salaries, fringe benefits and involvement in the University community from that of

full-time faculty. The income of part-time faculty derived from the University is generally supplemental to income derived elsewhere or, in effect, often in the nature of honoraria. As more fully set forth below the lesser financial obligations of the University to its part-time faculty represents an acknowledgment of the limited role that part-time faculty can and do play in the student-faculty life of the University.

It is here also pertinent to note that the formula for the remuneration of the part-time faculty members whom the University seeks to include in the unit in no way varies from the formula of compensation and fringe benefits to which all part-time faculty are subject. In other words, notwithstanding the fact that a part-time faculty member may have taught six hours over the last six semesters, his salary rate is still paid on a per-course basis with none of the perquisites and fringe benefits payable to the full-time faculty. Notwithstanding his continuous employment or course load, the part-time faculty member remains subject to no limitation on or exclusion of outside employment as do the full-time faculty. The position of the University in favor of the inclusion of certain part-time faculty is absolutely arbitrary in implying any distinction between the basis and nature of the compensation paid to this limited class of part-time faculty and the balance of the part-time faculty employed at any time by the University.

(ii) Participation in University Governance

For the purposes of assessing the relative participation of part-time faculty in University government, it is relevant to look first at those schools, including the majority of the University faculty, which function in terms of governance under formal constitutions and/or by-laws. At Yeshiva College, for example, the Faculty Statutes define regular members of the faculty as those who teach a full-time program and who are employed on a regular full-time appointment at an annual salary, as conferred in the letter of appointment from the President (A. 1528). Accordingly part-time faculty at Yeshiva College are not allowed regular membership to participate in the faculty assembly, except for a provisional status for those part-time faculty who request such participation and who have been teaching in the College for five or more years and teach three or more hours at the College. This definition of participation in the faculty governance at Yeshiva College is, of course, facially discrepant with the formula proposed by the University herein for the inclusion of part-time faculty.

In fact, however, participation of part-time faculty on the Yeshiva College faculty assembly is even more circumscribed in actual practice by reason of the limitation of time that part-time faculty have available to attend such meetings. At Yeshiva College the dean acknowledged that part-time faculty do not attend faculty meetings as much as he would like to see them, and more specifically, on cross examination, did not recall any

part-time faculty coming to faculty assembly meetings except for a single individual (A. 415, 496-97). The dean of Yeshiva College acknowledged that that full-time faculty attend a high percentage of the faculty assembly meetings, while part-time faculty with jobs elsewhere generally cannot make the daytime meetings: "It is difficult to expect these people to take off from their jobs to come to the faculty assemblies." (A. 495).

The Yeshiva College also has a College Senate, composed of administration, faculty, students and alumni. Pursuant to the constitution of the Yeshiva College Senate, faculty membership is limited to eight full-time faculty members (A. 1571). The constitution of the Yeshiva College Senate, as well as the by-laws of the faculty assembly, establish certain standing committees, limiting membership on those committees to voting members of the faculty (A. 1533). There are no part-time faculty on the standing committees at Yeshiva College.

At Stern College, the governing instrument for the faculty there prescribes that all full-time members of the faculty are entitled to vote at faculty meetings, while only part-time faculty who have been at the college three or more consecutive years and teach three or more hours are entitled to the same (A. 1549). This same instrument requires that every full-time faculty member shall serve on at least one committee, with no corresponding requirement for part-time faculty. In defining the composition of the standing committees, membership on the committee on curriculum, committee on academic standing and committee on promotions is limited

to those who have full-time faculty ranks at the school (id.). There are no part-time faculty on the Stern College student-faculty senate (Tr. 2227). In fact, there is only one part-time faculty member on any standing committee, and he holds a full-time appointment at Brooklyn College (A. 1546). The dean testified that there are no part-time faculty members on any of the ad hoc committees (Tr. 2223, 2235). The dean also noted that with respect to department meetings which he has attended, he can recall only one occasion when a single part-timer participated (Tr. 2197).

At the Belfer Graduate School there are only three part-time faculty members, of which only two are currently teaching. All three of those persons are affiliated with other academic institutions (Univ. Exh. 130). The constitution of the Belfer Graduate School establishes a faculty council to represent the faculty to serve in an "advisory capacity to the dean of the school and the president of the University." (Univ. Exh. 131). Membership on the faculty council is limited exclusively to full-time titles and thus excludes all part-time faculty from membership (id.). The Faculty Committee at the Belfer Graduate School is a smaller body, which likewise advises the dean and the president, and includes all department chairmen and elected representatives from each department. This committee likewise limits its membership to full-time faculty (id.). While part-time faculty may nonetheless attend faculty and/or department meetings, they are neither entitled to vote at the faculty meetings nor to vote in the selection of the department chairman, as the by-laws of the Belfer

Graduate School define membership in a department so as to preclude part-time faculty. (id.).

The Ferkauf Graduate School, like the Belfer Graduate School, has no part-time faculty who would be included in the unit according to the standards which the University proposes herein (Univ. Exh. 145). Also like the Belfer Graduate School, the Ferkauf Graduate School faculty assembly acts in an advisory capacity to the dean and through the dean to the president and board of trustees of the University (A. 1611). The by-laws of the Ferkauf faculty limit full membership to University officers and full-time faculty; part-time faculty may be associate members of the faculty upon recommendation from their department chairman and with the approval of the dean (A. 1612). Only full-time faculty may comprise the required quorum at faculty meetings (A. 1616). There are no part-time faculty on the school's standing committees (Tr. 4034). The dean also testified that part-time faculty attend faculty meetings only "very infrequently" (A. 1144). Only some part-time faculty attend department meetings, and there is no indication that they take part in the election of department chairmen (A. 1201).

At the Werzweiler Graduate School, there are no formal governance instruments, although the faculty periodically meets as in the dean's words, a "community of scholars" (A. 925). As part of the community, the dean indicated that full-time faculty were expected to attend and, in fact, all full-time faculty generally do attend faculty meetings, while part-time faculty attend such meetings very irregularly (A. 1015). There is no department

structure at the Werzweiler Graduate School. It should also be here noted that there are no part-time faculty at this school who would be included in the unit under the standards of the University (Univ. Exh. 137).

In each of the Jewish studies programs, the James Striar School, Erna Michael College and the Yeshiva Program, there are no formal governing instruments for the faculty, and in each case the deans and directors testified that the faculty groups are very informal and function informally (A. 586, 674). In each of these programs, full-time and part-time faculty will attend faculty meetings, which are convened and conducted according to no formal or regular by-laws or rules. At the Erna Michael College, there are no part-time faculty who would qualify for inclusion in the unit according to the standards proposed by the University. At the James Striar School, four part-time faculty members meet the proposed standards of the University, but only one part-time faculty member takes part in activities of the standing committees (Univ. Exh. 119-20). The Yeshiva Program, the third division of Jewish studies, includes no part-time faculty (Univ. Exh. 142).

At the Bernard Revel Graduate School, three of the ten part-time faculty members would qualify for inclusion in the unit under the proposed standards of the University (Univ. Exh. 140). This School also has no formal governance documents and functions informally. While full-time and part-time faculty may attend and participate at faculty meetings, all full-time faculty regularly attend faculty meetings, while part-time faculty do not

(A. 1129). Moreover, while all full-time faculty are active on committees, part-time faculty participate to significantly lesser extent (A. 1130; Tr. 3837).

At Teacher's Institute for Women, the director there has designated certain faculty members as "full-time," according merely to the number of hours they are currently teaching, while he also acknowledged that he would consider a part-time faculty member whose course load became 12 hours to thus become a full-time faculty member. It is apparent, however, that in fact all ten faculty members at Teacher's Institute for Women are part-time faculty (Univ. Exh. 123).^{*} At Teacher's Institute for Women, the faculty meets periodically with no distinctions as to the participation of any of its faculty (A. 730-32).

While the part-time faculty in the Jewish studies programs may partake to a greater extent than the part-time faculty elsewhere in the University on matters affecting their specific school or program, there is not a single part-time faculty member at any of these schools or programs who participates on any standing University-wide council or committee. In fact, on a University-wide basis, only full-time faculty sit on the Councils of the Graduate and Undergraduate Schools, the Resource Allocation and Academic Priorities Committee, the ad hoc Committee to formulate a University senate, and the University Review Committee. Thus with respect to any body that has University-wide interest or jurisdiction under the Faculty Handbook, part-time faculty have been and are excluded from participation de jure and de facto.

^{*}See pp. 89-90 and 98, supra.

The dean at Stern College for Women aptly summarized the relative role of part-time faculty in the University community in response to questions as to his stated preference for the hiring of full-time faculty:

"When the University extends a full-time employment to an individual, it does feel that it has the right to demand more direct involvement of that individual than it might for a part-time faculty member. And, therefore, to the extent that we can afford to have as many full-time people on the faculty concerned for the welfare of the students and the college, it is to be used to the benefit of our educational enterprise. And, therefore, it is our hope to have as many full-time people as we can...By virtue of their part-time employment, the College and University have less of a claim on (part-time faculty's) time." (A. 380)

Under any analysis of the role of part-time faculty in the governance and operation of the schools or divisions of Yeshiva University and the University as a whole, the University formula for inclusion of part-time faculty must fail as arbitrary according to any reasonable standard. It does not conform to any requirements for even limited participation in faculty governance at most of the schools, and with respect to the smaller Jewish Studies programs, it excludes some part-time faculty who may take a part in school governance on the same basis as those part-time faculty the University would include in the unit.

As the record herein amply demonstrates, part-time faculty play a significantly lesser role in student and faculty affairs at the University. While they may indeed be scholars like full-time faculty, while there may be interchange between full-time and part-time faculty in the courses taught, and while

even part-time faculty may become full-time faculty or vice-versa, their involvement in the governance at the University is not required or even expected by the University. For the full-time faculty, involvement and participation in University and school committee activities is inherent to the conditions of their employment.

(iii) Rank and Tenure

Pursuant to the Faculty Handbook, tenure eligibility is limited to full-time faculty, who will receive tenure for seven-years full-time service in the rank of either Assistant Professor, Associate Professor or Professor, or at the will and designation of the President (A. 1502). Faculty whose initial and subsequent full-time appointment is subject to special funding or in connection with special projects, e.g., research or teaching grants, will not receive credit for service toward tenure (id.).

With respect to the faculty at Teacher's Institute for Women, where the director has designated certain persons teaching 12 hours in the current semester as "full-time," he acknowledged that that faculty have no procedural rights derivative from the tenure statute, but that their "job security" or "tenure" is de facto, referring to an unwritten understanding that no Teacher's Institute for Women faculty are fired (A. 775; Tr. 3070). The director of Teacher's Institute for Women, in the employ of the University since 1966, and serving on the Executive Council of the University, which recently amended the tenure provisions, then indicated that he was not familiar with the tenure policy of the University as it otherwise applies to full-time faculty (A. 680).

The dean at the Erna Michael College likewise raised an issue as to whether any tenure provisions applied to his faculty (A. 571), but indicated that after seven years of service he considered there to be effective tenure. Notwithstanding extended colloquys over whether or not University tenure policy applies to these schools, the Faculty Handbook limits the tenure provisions to full-time faculty appointed by the President of the University (A. 1501).

Full-time faculty are generally appointed by letter from the President of the University, while part-time faculty are appointed by their respective deans or directors (A. 438, 849, 882, 1013; Tr. 3089, 3094, 4056). In the hiring of faculty, full-time faculty will usually be afforded the rank of assistant professor, or in those cases where they are especially qualified, deans will recommend to the President their hiring at a higher rank (A. 500). As the dean of Yeshiva College testified, an "outsider," part-time faculty employed at another school, usually gets a visiting prefix to whatever title he may hold at another university, while members of the "University family," full-time faculty, will be designated professional titles according to the qualifications (A.2336). If part-time faculty are not affiliated with other academic institutions, they will receive such titles as visiting lecturer (Tr. 2327) or instructor (Tr.2605). At one graduate school, part-time faculty are given an adjunct title according to their title at other academic institutions (A. 1139); at another graduate school, part-time faculty have no title or rank (A. 1010). There are no promotional lines for part-time faculty (A. 702, 1502).

University witnesses acknowledged repeatedly the lesser availability of and role played by part-time faculty in the University community, and it appears that the University itself acknowledges some real distinction between the communities of interest of full-time and part-time faculty by its position that only certain part-time faculty be included in the unit. The University, however, has constructed an arbitrary formula according to a measure of continuity of employment with a fixed minimum workload; neither that continuity nor such a workload, however, bears realistically upon the limited nexi of part-time faculty to the University. While part-time faculty might fall within or without the criteria the University proposes, the terms and conditions of their appointment would otherwise not substantially or materially be altered.

In fact, the University construct for the inclusion of part-time faculty is unworkable in practical terms. Part-time faculty may take a semester away, or a course may not be offered in a particular semester, or the contact hours for a course may be reduced, whereby those part-time faculty members included in the unit according to the University proposal would be in constant flux. Would the criteria which the University suggests be effective each semester or each academic year? The artificial criteria proposed by the University would render the faculty bargaining unit so unstable as to threaten even its potential effectiveness for the full-time faculty.

A close analysis of the record herein demonstrates a similar disparity in the community of interests between part-time and full-time faculty that has caused the Board, since New York University I, supra, to exclude part-time faculty from full-time faculty bargaining units. Notwithstanding some involvement of part-time faculty in issues of curriculum and standards in the small Jewish studies programs and the ambiguity which the director for the Teacher's Institute for Women created in his singular definition of "full-time" faculty, the Board properly ruled that an appropriate faculty unit at Yeshiva University did not require inclusion of part-time faculty.

I. The Board Acted Within Its Proper Discretion In Allowing "Terminal" Faculty Members Employed on the Dates of the Election to Vote

Here the University seeks to repudiate consistent Board precedent in the determination of faculty bargaining units and bargaining units in a more conventional industrial modality. This Court is respectfully referred to the brief of the Board at pp. 49-52, setting forth in full detail the applicable law and standards under which the Board has acted in regularly and properly allowing unit members employed on the election date to vote, irrespective of their planned resignation or termination.

Even upon notice of resignation or termination, the full-time faculty member is expected to continue his employment through and until the end of the academic year (A. 397). Faculty members may appeal terminations through their respective welfare committees (A. 398), or may appeal through the University Review Committee, or even directly over their dean's head to the Vice President for Academic Affairs (A. 393). Moreover, as the University acknowledged, there are occasions where faculty members who have received notices of termination will in fact come back to teach the following year (A. 392).

Terminating faculty may give notice virtually on the first day of a new academic year of his termination at the close of that year (A. 390). With respect to those faculty who resign effective the next academic year, they retain the full benefits and perquisites of their employment (*id.*). Furthermore, while the stated retirement age is 65, a super-annuated faculty member may continue on a year-to-year basis with permission of the President

(A. 1508). There is nothing in the record herein to indicate that such individuals do not fully participate in the affairs of the faculty and share and maintain their full interest in the terms and conditions of their employment.

Thus a full-time faculty member whose anticipated term of employment at the University will cease at the end of the academic year, whether by termination, resignation or retirement, maintains such an interest in the terms and conditions of his employment and such a role in the University community so as to warrant his inclusion in the bargaining unit. Manhattan College, 195 NLRB 65 (1972); Tusculum College, 199 NLRB 28 (1972); New York University I, supra; Fordham University II, supra.

The contention of the University here, seeking to disenfranchise terminating faculty members from participation in the representative election, was found "clearly inconsistent with the majority rule principle of the Act [insofar as it would deny] a member of the unit at the time of the election a voice in the selection of his or her bargaining representative." Allied Chemical & Alkali Workers of America Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 175 (1971).

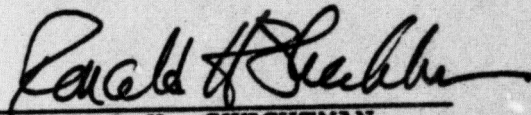
CONCLUSION

For the reasons herein set forth, intervenor-petitioner YUFA respectfully requests that the Court enforce the order of the Board, as herein petitioned for, in all respects.

Dated: New York, New York
February 27, 1978

Respectfully submitted,

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77-4182

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
and
YESHIVA UNIVERSITY FACULTY ASSOCIATION,
Intervenor-Petitioner,
v.
YESHIVA UNIVERSITY.

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

THOMAS MITCHELL, being duly sworn, deposes and

says, that he is over 18 years of age. That on the 1st day of

March, 1978, he served 2 copies of

the attached Brief for Intervenor-Petitioner on

the attorney for the Petitioner

herein by depositing the same, properly enclosed in a securely sealed

post-paid wrapper, in a U. S. Post Office at 90 Church Street, New

York City, directed to said attorney ~~xxx~~ Elliott Moore, Esq.
Deputy Associate General Counsel
Division of Enforcement Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

that being the place where they maintain an office for the

regular transaction of business, and the last address mentioned in

the papers last served by them.

Thomas Mitchell

Sworn to before me this

1st day of March, 1978.

Monroe D. Rosen

MONROE D. ROSEN
Notary Public, State of New York
No. 24-4616690
Qualified in Kings County
Commission Expires March 30, 1979

Service of ^{two} three (3) copies of the within BRIEF FOR INTERVIEWER

PETITIONER is admitted this 1st day of May 1978

Levi J. Kay
SAUL KRAMER, Esq.
PRESKAVEN, ROSE, GLEZ + MENDELSON